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No. 07-

In the Supreme Court of the United States

CONTINENTAL CARBON CO. AND CHINA SYNTHETIC RUBBER CORP.,

Petitioners,

v.

ACTION MARINE, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition challenges a $17.5 million award of punitive damages for petitioners' failure to do more to prevent periodic releases of carbon black during the manufacturing process. There are no claims of physical injury, only property damage. And the compensatory damages of $1,915,000 are substantial by any definition: Among other things, they include the costs of remediating properties that tested negative for carbon black, reimbursement for a company's ordinary business debts (such as a mortgage and a truck loan), and compensation for the emotional distress allegedly suffered by the owner of the company.

The general question presented is whether the $17.5 million punitive award is unconstitutionally excessive under *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). More specifically, this case raises questions about the application of the three *BMW* guideposts, each of which has divided the lower courts:

1. Whether courts applying the reprehensibility guidepost should consider how the defendant's conduct compares to conduct in other punitive damages cases in determining whether the amount of punitive damages is out of proportion to the gravity of the offense.

2. Whether, and if so in what circumstances, a punitive/compensatory ratio in excess of 1:1 is allowable when the amount of compensatory damages is "substantial" and other forms of punishment and deterrence, including significant attorneys' fees for "bad faith" and extensive injunctive relief, have already been imposed.

3. Whether, in applying the comparable penalties guidepost, a reviewing court may disregard the most realistic legislative penalty and instead speculate about the remote possibility of a severe, yet unprecedented and extremely unlikely, fine.

RULE 29.6 STATEMENT

Petitioner Continental Carbon Co. is wholly owned by CCC USA Corporation, which is two-thirds owned by Petitioner China Synthetic Rubber Corporation and one-third owned by Taiwan Cement Corporation. Both China Synthetic Rubber Corporation and Taiwan Cement Corporation are publicly traded in Taiwan. No publicly owned company owns more than 10% of China Synthetic Rubber Corporation's or Taiwan Cement Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Continental Carbon Co. and China Synthetic Rubber Corp. (collectively "CCC") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-32a) is reported at 481 F.3d 1302. The order of the court of appeals denying rehearing (App., *infra*, 55a) is unreported. The orders of the district court denying petitioners' post-trial motions (*id.* at 33a-47a), entering injunctive relief (*id.* at 48a-54a), and entering final judgment on the claims submitted to the jury (*id.* at 56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2007, and a timely petition for rehearing was denied on May 18, 2007. Justice Thomas extended the time for filing a petition for writ of certiorari to August 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

O.C.G.A. § 13-6-11 and ALA. CODE § 22-22A-5(18)(c) are included in the appendix at 57a.

STATEMENT

Over the past decade and a half, this Court repeatedly has expressed concern about awards of punitive damages that, "today, may be many times the size of such awards in

the 18th and 19th centuries." *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064 (2007). To assist courts in determining when a punitive award is unconstitutionally excessive, the Court has identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio between the punitive and compensatory damages (or potential harm in the unusual circumstance of a thwarted attempt); and (iii) the difference between the punitive damages and the legislative and/or administrative penalties for comparable misconduct. *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574-85 (1996). And it has required "[e]xacting appellate review" of the trial court's analysis of these guideposts to ensure that the amount of punitive damages is "based upon an application of law, rather than a decisionmaker's caprice." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417-18 (2003) (internal quotation marks and alterations omitted).

Regrettably, lower courts often apply the *BMW* guideposts mechanically without considering this Court's broader concerns about the size of punitive awards, such as whether they are "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585), "extraordinary by historical standards" (*id.* at 594 (Breyer, J., concurring)), or excessive in relation to a "State's legitimate interests in punishing unlawful conduct and deterring its repetition" (*id.* at 568). Moreover, courts routinely misapply the guideposts, weakening their "constraining power to protect against serious and capricious deprivations [of property]" (*id.* at 590 (Breyer, J., concurring)). This case is emblematic. In affirming a $17.5 million punitive award that is over nine times the compensatory damages, while ignoring the punitive and deterrent effect of the compensatory damages, attorneys' fees, and injunctive relief, the Eleventh Circuit applied the *BMW* guideposts in a manner that deprived them of their "constraining power." Review is necessary because the Eleventh Circuit's decision is unfaithful to the Court's precedents and conflicts with numerous decisions applying those precedents.

1. CCC's operations. CCC owns a plant in Phenix City, Alabama, that manufactures carbon black. R52, 534. Carbon black is a highly engineered product that is manufactured by heating feedstock oil to a high temperature in a low-oxygen reactor. R218-19. The resulting product is smoke that includes both carbon black and waste gases. R84. The carbon black is separated from the gases, processed, and formed into small pellets for ease of handling and shipment. R217, 226.

Carbon black has many commercial applications. Its most popular use is in making tires. CCC also sells carbon black for use as pigment in rubber and plastic items, inks, and many other useful products. Dkt. 38, at 3.

While the plant originally had one production unit, Unit 1, CCC built a second production unit in 1999, Unit 2, to meet expanding demand for carbon black. R224. During construction, CCC worked with the Alabama Department of Environmental Management ("ADEM") to identify and install the best available pollution-control technology.[1] R221-22, 347, 563. For example, each unit has several large "bagfilter" compartments, each of which contains several hundred bags that collect the carbon black after it is produced. R217, 221, 559-60. A thermal oxidizer is designed to incinerate any particulate matter not captured by the bagfilters (including carbon black) at 1700 degrees Fahrenheit. R221, 332, 343. The gas stream that comes out of the thermal oxidizer is vented through a stack. R350. Electronic probes called Triboguards detect any solid particles in the stream and sound an alarm if anything is amiss so that employees can investigate. R223, 345-46, 350.

ADEM recognized that this technology, while the best available, was not perfect and issued a permit to CCC to emit

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[1] Under the Clean Air Act, State agencies—not industry—determine the best available pollution control technology. See *Alaska Dep't of Envtl. Conserv.* v. *EPA*, 540 U.S. 461, 468-69 (2004).

120 tons per year of particulate matter, including carbon black. R327-28, 937-38. Unfortunately, some carbon black emissions did occur: Unit 1 developed leaks (R167-68, 372, 425, 497, 1335, 1340), while Unit 2 had insufficient bagfilter capacity, causing premature bag failure (R71-75, 367-68).

Nevertheless, uncontradicted evidence showed that CCC identified and remedied the causes of emissions when they occurred (PX17) and repaired and replaced parts of its existing plant (R74-75, 167, 182-83, 385, 572). CCC also built new plant facilities, including two additional bagfilter compartments for Unit 2 in 2003. R75, 1361. These additional bagfilter compartments "pretty much" solved the Unit 2 problems. R1361.

A group of nearby property owners—a boat dealership, Action Marine, Inc.; its owner John Tharpe; the City of Columbus, Georgia; and city resident Owen Ditchfield—were dissatisfied with these measures. They claimed that carbon black had periodically escaped from CCC's plant and been carried by the wind onto their properties, causing a black discoloration.[2] And they wanted CCC to do more to remedy the emissions sooner. In particular, they wanted CCC to replace Unit 1 instead of trying to repair the leaks first. R167-68, 372, 425, 497, 1335, 1340. And they asserted that CCC waited too long to replace the Unit 2 bagfilter system. R71-75, 367-68.

2. Respondents sue CCC and receive a huge verdict. These property owners—respondents in this Court—eventually brought claims against CCC for negligence, nuisance, trespass, and wantonness under Georgia law. Respon-

[2] Action Marine claimed that its boats were discolored and that it was therefore losing customers. R1052-53. The City claimed that carbon black emissions had blackened the roof of the Civic Center and caused black streaking at nearby city facilities. R1010-11, 1224, 1230-32. Owen Ditchfield claimed that the material dirtied the paint on his houses and the finish on his vehicles. R1188-90.

dents sought recovery for their property damage, injunctive relief, punitive damages, and attorneys' fees for "bad faith" under O.C.G.A. § 13-6-11. They did not claim any physical illness or injury.[3]

CCC contested several elements of the various causes of action as well as the extent of respondents' damages: Several of the properties for which the City sought recovery tested negative for carbon black. R1447, 1613, 1795-96; R1448, 1794, PX104B-63; R1451-53, 1616, PX104A-2, 104B-21, DX162, at 5. Moreover, only tiny amounts of carbon black were present on all of respondents' other properties except one of Action Marine's boats. R1786-89, 1802-03, 1817, 1825, 1863-64; DX162. On these properties, microscopic examination revealed that other dark particles such as mold spores and pollen—not carbon black—were responsible for the discoloration. R1782-83, 1791-92.

The jury nevertheless returned a general verdict for respondents and awarded them $1,915,000 in compensatory damages: $45,000 to Ditchfield, $100,000 to Tharpe for emo-

[3] Moreover, there was no evidence that the carbon black emissions posed a health risk to the community. Though the Eleventh Circuit disagreed, its position was based on the erroneous belief that CCC's Material Safety Data Sheets ("MSDSs") proved that carbon black emissions were possibly carcinogenic to humans. App., *infra*, 24a & n.20. In fact, the MSDSs state that the U.S. National Toxicology Program and the U.S. Occupational Safety and Health Administration have *not* designated carbon black as a carcinogen. PX32-17. While one agency, IARC, has concluded that carbon black has possible carcinogenic effects based on rat inhalation studies, and therefore classified carbon black as a class 2-B carcinogen, even it acknowledged that "'*[t]here is inadequate evidence in humans for the carcinogenicity of carbon black.*'" *Id.* (emphasis added). Plaintiffs presented no evidence that either humans or animals could potentially get cancer or suffer other adverse health effects from the periodic, atmospheric releases of carbon black at issue here.

tional distress, $1.2 million to Action Marine for lost business value, and $570,000 to the City for remediation costs. Dkt. 216. The City's award included $132,350 for properties that did not test positive for carbon black. PX113, at 19-20; Appellants' Br. 17 n.2. And Action Marine's award included lost profits as well as $795,000 for payment of ordinary business debts, such as a mortgage and a truck loan, that Action Marine claimed it would have paid down with those profits but for the discoloration. R1111-16; PX79, Ex. 5. The jury also awarded respondents $17.5 million in punitive damages, as well as $1,294,000 in attorneys' fees based on a finding of "bad faith." Dkt. 216; Dkt. 217.

3. The district court enters judgment for respondents. The district court denied CCC's post-trial motions and entered judgment on the verdict. App., *infra*, 33a-47a. The court recognized that the $17.5 million punitive award was over nine times the compensatory damages and seventy times the maximum civil penalty of $250,000 under Alabama law (the state with regulatory authority over the plant). *Id.* at 45a-46a & n.6 (citing Ala. Code § 22-22A-5(18)(c)). But the court held that these disparities were permissible, relying primarily on *Johansen* v. *Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), a pre-*State Farm* case that allowed $4.35 million in punitive damages even though that amount "was around 100 times the amount of actual damages awarded by the jury" and "100 times greater than the maximum penalty that could have been imposed." App., *infra*, 45a-47a & n.6.

The district court also ordered extensive injunctive relief. App., *infra*, 48a-54a. CCC had to replace or repair substantial parts of the Unit 1 bagfilter system; submit to air and video monitoring; and file progress reports subject to court verification. *Id.* at 49a-53a. A CCC employee estimated that these measures would cost at least $4.2 million. R475-76.

4. The court of appeals affirms. CCC appealed to the Eleventh Circuit, which affirmed the judgment. App., *infra*,

1a-32a. As relevant here, the court concluded that CCC's conduct was "exceedingly reprehensible" and supported $17.5 million in punishment. *Id.* at 23a-26a. But the court admitted that it reached its reprehensibility conclusion without comparing CCC's conduct to the misconduct in other punitive damages cases, instead basing its holding "on the facts before us in this case alone." *Id.* at 25a-26a.

The court also held that a 5.5:1 ratio—which it reached by adding the $1,294,000 attorneys' fees award for "bad faith" to the compensatory damages of $1,915,000 to produce a total denominator of $3.2 million—was acceptable. *Id.* at 27a-29a. Relying on Ninth Circuit decisions, the court reasoned that while "ratios in excess of 1:1 and/or 4:1 may only rarely satisfy due process requirements," and "a 1:1 ratio [is] the general rule when substantial compensatory damages have been awarded," this case was "the rare exception" in which a higher ratio was allowed. *Id.* at 28a-29a & n.24 (citing *In re Exxon Valdez*, 472 F.3d 600, 624 (9th Cir. 2006); and *Planned Parenthood of Columbia/Willamette, Inc.* v. *Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005), cert. denied, 547 U.S. 1111 (2006)).

Finally, the court held that Alabama Code § 22-22A-5(18)(c) provided fair notice of a $17.5 million punishment. App., *infra*, 29a-32a. As the court explained, that provision limited fines to $25,000 "per violation" and up to $250,000 "per order." *Id.* at 30a. But nothing in the statute, it noted, expressly precluded ADEM from issuing multiple orders. *Id.* at 30a-31a. Thus, the court believed that it was reasonable to assume that, "if Alabama citizens have found themselves the victims of [CCC's] malfeasance," ADEM would have issued repeated orders, ultimately fining CCC "several million dollars." *Id.* at 31a. Accordingly, it held that the $17.5 million punitive award satisfied due process. *Id.* at 31a-32a.

REASONS FOR GRANTING THE PETITION

This Court has long cautioned that "punitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994). In *BMW*, it adopted three guideposts to help courts identify when a "multimillion dollar penalty" is "grossly excessive" and a "lesser" award would adequately advance the State's interests in punishment and deterrence. 517 U.S. at 584-85.

Unfortunately, *BMW* did not have its intended effect. Hence, the Court was compelled to provide additional guidance in *State Farm*. Although it found State Farm's conduct "reprehensible," the Court held that "a more modest punishment" than the $145 million awarded by the jury "could have satisfied the State's legitimate objectives." 538 U.S. at 419-20. The Court suggested that, "in light of the substantial compensatory damages," a "punitive damages award at or near the amount of compensatory damages"—$1 million—was likely the constitutional maximum. *Id.* at 429.

Yet even *State Farm* did not stem the tide of large punitive awards. Thus, in 2006 this Court granted certiorari to review a $79.5 million punitive award. See *Philip Morris USA* v. *Williams*, 126 S. Ct. 2329 (2006). In *Philip Morris*, the Court agreed to consider whether: (i) the Due Process Clause prohibits juries in individual cases from punishing defendants for injuries suffered by non-parties; and (ii) the $79.5 million punitive award was unconstitutionally excessive. *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062 (2007). Because the Court ruled for Philip Morris on the first issue, it did not need to reach the excessiveness issue. *Id.* at 1065.

This case offers a perfect opportunity to provide the guidance on the proper application of the *BMW* guideposts—and on the excessiveness inquiry more generally—that the lower courts sorely need but that the disposition in *Philip Morris* forestalled. The Eleventh Circuit's conclusion that a $17.5 million punitive exaction is constitutionally acceptable

is irreconcilable with the concerns about arbitrary punishments that this Court repeatedly has expressed. Moreover, that court's strained application of the *BMW* guideposts directly conflicts with numerous decisions by other federal circuit courts and state courts of last resort. The depth, breadth, and significance of these conflicts strongly support certiorari.

I. THE LOWER COURTS ARE SPLIT AND NEED GUIDANCE ON THE PROPER APPLICATION OF THE *BMW* GUIDEPOSTS.

The Eleventh Circuit's application of each *BMW* guidepost conflicts with numerous federal circuit court and state supreme court decisions. Review is necessary and appropriate because these issues that have divided the lower courts arise with regularity in punitive damages litigation.

A. There Is A Conflict Regarding Whether Reviewing Courts Should Consider The Full Spectrum Of Punishable Conduct When Applying The Reprehensibility Guidepost.

The first guidepost—the degree of reprehensibility– is "[t]he most important indicium of the reasonableness of a punitive damages award." *State Farm*, 538 U.S. at 419 (internal quotation marks omitted). Here, the Eleventh Circuit concluded that CCC's conduct was "exceedingly reprehensible." App., *infra*, 23a-26a. In so holding, the court expressly "declined [CCC's] invitation" to compare its conduct to that of defendants in other punitive damages cases. App., *infra*, 25a-26a. Instead, citing the three-Justice plurality's rejection of a "comparative approach" in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 458 (1993), the court based its reprehensibility "conclusion on the facts before us in this case alone." App., *infra*, 26a. The Sixth Circuit has likewise expressed "war[iness] of any attempt to graft our ruling here onto another set of facts" because of its perception that *TXO* forecloses a comparative approach. *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007).

But the *TXO* plurality did not affirmatively condemn comparisons with other cases; it merely refused to "enshrine" a comparative analysis as part of a "test." 509 U.S. at 458. Indeed, as the Eleventh Circuit acknowledged (App., *infra*, 26a), the plurality "[did] not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations." *Ibid.* (emphasis omitted). In any event, the plurality's decision not to embrace any particular "test" commanded only three votes, and the Court's punitive damages jurisprudence has since taken a different path. Of particular significance, the Court in *BMW* directed lower courts to apply three guideposts when reviewing a punitive award for excessiveness. 517 U.S. at 574-85. In describing the reprehensibility guidepost, the Court explained "that some wrongs are more blameworthy than others." *Id.* at 575. That is a tacit recognition that some comparison with the conduct in other cases is essential.

Moreover, as the Court later emphasized in requiring "*de novo*" application of the guideposts, "'assur[ing] the uniform general treatment of similarly situated persons * * * is the essence of law itself.'" *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). Disregarding the results in other cases is antithetical to the even-handed application of justice that this Court has required and is destined to lead to an upward spiral of punitive damages awards. As the Court has made clear, the reprehensibility guidepost is supposed to ensure that the amount of punitive damages is not out of proportion to "'the enormity of [the] offense.'" *BMW*, 517 U.S. at 575. That objective becomes illusory if courts persist in evaluating the offense in isolation instead of placing it on a spectrum of punishable conduct informed by other punitive damages cases. Cf. *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2510 (2007) ("The strength of an inference cannot be decided in a vacuum. The inquiry is inher-

ently comparative * * *."); *BMW*, 517 U.S. at 594 (Breyer, J., concurring) ("[a] punitive damages award of $2 million for intentional misrepresentation causing $56,000 of harm is extraordinary by historical standards").

Accordingly, the Eighth and Ninth Circuits and the California Supreme Court have recognized that the reprehensibility guidepost requires courts to compare the misconduct at issue to the conduct in other punitive damages cases—*i.e.*, to place the conduct on a spectrum of reprehensibility. See, *e.g.*, *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 775 (9th Cir. 2005) (misconduct in connection with the performance of "a socially valuable task" is less reprehensible than conduct serving no legitimate purpose, such as "intentional, repeated ethnic harassment"); *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (affirming $1.25 million punitive award for breach of fiduciary duty because the misconduct, "according to the hierarchy of reprehensiveness, was clearly more reprehensible than the conduct in [*BMW*], and is at a similar level to the conduct in *State Farm*"); *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) (reducing punitive award from $1.7 million to $50,000 in part because the fraud at issue was "of relatively low culpability" compared to "the universe of cases warranting punitive damages under California law"); cf. *Goddard* v. *Farmers Ins. Co.*, 120 P.3d 1260, 1262, 1282-84 (Or. Ct. App. 2005) (reducing $25 million punitive award to $2,589,822 because defendant's "manifestly malicious and deceitful" misconduct fell in the middle of the egregiousness spectrum when compared to other cases), modified on reconsideration, 126 P.3d 682 (Or. Ct. App. 2006), rev. granted, 143 P.3d 239 (Or. 2006).

This conflict potentially affects every punitive damages case because all reviewing courts must apply the reprehensibility guidepost. The issue is also very significant in this case: Had the Eleventh Circuit been willing to compare CCC's conduct—the failure to do more to prevent periodic

releases of carbon black during the manufacturing process—to the conduct of defendants in other punitive damages cases, the outcome likely would have been different. CCC's conduct involved a lesser degree of reprehensibility because carbon black production is a "socially valuable" task. See *Bains*, 405 F.3d at 775. Moreover, other courts have reduced punitive awards to amounts well below $17.5 million even though the misconduct at issue was markedly more egregious than CCC's periodic failure to prevent carbon black releases.

In *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), for instance, the Eighth Circuit held that the defendant's "conduct was highly reprehensible":

> Pall Mall cigarettes were extremely carcinogenic and extremely addictive * * *; the sale of this defective product occurred repeatedly over the course of many years despite American Tobacco's knowledge that the product was dangerous to the user's health; and American Tobacco actively misled consumers about the health risks associated with smoking. Moreover, the reprehensible conduct [led to] a most painful, lingering death following extensive surgery.

Id. at 602-03. The Eighth Circuit nevertheless reduced the $15 million punitive award to $5 million. *Id.* at 603.

In *Planned Parenthood*, anti-abortion activists put up "WANTED" posters threatening doctors who provided abortions. 422 F.3d at 958. The risk of harm was so serious that the FBI "warned [the] physicians to purchase bullet proof vests." *Ibid.* Applying *State Farm*, the Ninth Circuit nevertheless reduced punitive awards totaling $109 million to just over $4.7 million. 422 F.3d at 963.

In *Eden Electrical, Ltd.* v. *Amana Co.*, 370 F.3d 824 (8th Cir. 2004), the district court could "hardly think of a more reprehensible case of business fraud." *Id.* at 828-29. Yet the Eighth Circuit affirmed the district court's determination that

the $17,850,000 punitive award was unconstitutionally excessive and had to be reduced to $10 million. *Ibid.*

And in *Kemp* v. *AT&T Co.*, 393 F.3d 1354 (11th Cir. 2004), AT&T was found to have participated in a "large-scale corporate" effort "to exploit customers who were unsophisticated and economically vulnerable" by misleadingly presenting gambling debts as "legitimate" long-distance phone charges. *Id.* at 1363. Despite evidence indicating that "AT&T intended to target financially vulnerable individuals" with its illegal gambling scheme (*ibid.*), the Eleventh Circuit reduced the punitive damages from $1 million to $250,000, concluding that even $250,000 would be "a meaningful deterrent to a corporation like AT&T." *Id.* at 1365; see also *Life Ins. Co.* v. *Johnson*, 701 So. 2d 524, 526-29 (Ala. 1997) (reducing punitive damages from $15 million to $3 million where defendant engaged in pattern of selling worthless Medicare supplement policies to "elderly, uneducated, single black women").

Under no stretch of the imagination can CCC's conduct—which did not cause physical injury or target vulnerable individuals—be placed in the same league of heinousness as the conduct of these other defendants. Review is necessary to clarify whether the Eleventh Circuit erred in disregarding the results in other cases, thereby allowing the aberrational award against CCC to stand.[4]

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[4] The Eleventh Circuit's reprehensibility assessment is flawed even if CCC's conduct is evaluated in isolation. First, the court stated that CCC "continued its course of action and inaction undeterred by both the prospect and reality of litigation." App., *infra*, 25a. But uncontradicted evidence showed that CCC identified and remedied the causes of emissions when they occurred, repaired and replaced parts of its existing plant, and built new facilities to curtail emissions—all before judgment was entered. See p. 4, *supra*.

Second, the court concluded that it was "of no consequence" "that Alabama permitted [CCC] to release carbon black into the atmosphere" because the permit did not allow for property dam-

B. There Is A Conflict Regarding The Maximum *Permissible Ratio When Compensatory Damages* Are "Substantial."

In *State Farm*, this Court explained that "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." 538 U.S. at 425 (emphasis added). Heeding this guidance, several courts, including the Sixth and Eighth Circuits, have reduced punitive awards to amounts at or near compensatory damages when the latter were "substantial." See, *e.g.*, *Bach*, 486 F.3d at 156 (6th Cir.) (reducing $2,228,600 punitive award for violation of Fair Credit Reporting Act to $400,000, the amount of compensatory damages, because "the plaintiff has received a substantial compensatory award, and a ratio of 1:1 or something near to it is an appropriate result"); *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 608 (6th Cir. 2006) (reducing $3 million punitive award for death caused by defective truck design to $471,258.26, the amount of compensatory damages);[5] *Boerner*, 394 F.3d at 603 (8th Cir.) (reducing ratio

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age. App., *infra*, 25a-26a n.21. But the existence of a permit to emit carbon black reduces CCC's culpability by undercutting the argument that simply letting emissions occur was reprehensible.

Third, the court suggested that the degree of reprehensibility was increased because of CCC's "willingness to elude accountability." *Id.* at 25a. It relied in part on evidence that CCC "apparently" was warned by ADEM prior to inspections. *Ibid.* But even if such warnings occurred, there was no evidence that CCC affirmatively sought them. Punishing a defendant for actions by a third party raises serious due process concerns. See, *e.g.*, *United States* v. *Ashland, Inc.*, 356 F.3d 871, 874 (8th Cir. 2004) (discussing "fundamental[] unfair[ness]" of "punishing a defendant based solely on the conduct of another party").

[5] The jury found 50% comparative fault; thus, the plaintiff received only $235,629.13. Using this figure as the denominator, one member of the two-judge majority treated the punitive/compensatory

from 3.7:1 to 1.2:1 where compensatory damages were $4,025,000); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 798 (8th Cir. 2004) (reducing $6,063,750 punitive award for racial harassment to $600,000, the amount of compensatory damages); *Jet Source Charter, Inc.* v. *Doherty*, 55 Cal. Rptr. 3d 176, 178 (Cal. Ct. App. 2007) (reducing $26 million punitive award for repeated breaches of fiduciary duty and fraud to $6.5 million because 1:1 is maximum ratio when the harm is economic, the plaintiff is not vulnerable, and the compensatory damages are "substantial").[6]

Other lower courts have refused to follow this guidance, however. The Ninth Circuit has held that, "in cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality." *Planned Parenthood*, 422 F.3d at 962. It allows even higher ratios if the behavior is more egregious. See *ibid.*; see also *In re Exxon Valdez*, 490 F.3d 1066, 1093-94 (9th Cir. 2007) (per curiam) (declaring 5:1 ratio permissible even though compensatory damages and settlement pay-

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ratio as being 2:1. *Clark*, 436 F.3d at 606-07. The other member of the majority believed that the full amount of compensatory damages should be used as the denominator and therefore considered the ratio to be 1:1. *Id.* at 613-14 (Kennedy, J., concurring).

[6] See also *Kent* v. *United of Omaha Life Ins. Co.*, 430 F. Supp. 2d 946, 959-60 (D.S.D. 2006), rev'd in part on other grounds, 484 F.3d 988 (8th Cir. 2007); *Casumpang* v. *Int'l Longshore & Warehouse Union, Local 142*, 411 F. Supp. 2d 1201, 1220 (D. Haw. 2005); *Ceimo* v. *Gen. Am. Life Ins. Co.*, 2003 WL 25481095, at *2 (D. Ariz. Sept. 17, 2003), aff'd, 137 F. App'x 968, 970 (9th Cir. 2005) (unpublished); *Walker* v. *Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (Cal. Ct. App. 2007); *Roby* v. *McKesson HBOC*, 2006 WL 3775897, at *19 (Cal. Ct. App. Dec. 26, 2006) (unpublished in relevant part), rev. granted, 156 P.3d 1014 (Cal. 2007); *Czarnik* v. *Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. Ct. App. Dec. 3, 2004) (unpublished).

ments totaled $513.1 million, because conduct was in "mid-range" on spectrum of reprehensibility). Likewise, the Federal Circuit has held that a 4:1 ratio is the "threshold where the punitive award may become suspect." *Rhone-Poulenc Agro S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003) (upholding 3.33:1 ratio where compensatory damages were $15 million). And several state supreme courts have allowed ratios above 4:1 even when the compensatory damages exceeded several hundred thousand dollars.[7]

The current case deepens this conflict. The compensatory damages of $1,915,000 are indisputably "substantial" and afford respondents "complete compensation" for their injuries. *State Farm*, 538 U.S. at 425-26. For example, one respondent recovered damages to remediate properties that tested *negative* for carbon black; another recovered damages to reimburse it for ordinary business debts (such as a mortgage and a truck loan); and a third recovered damages for the emotional distress of worrying about the harm to his business allegedly caused by carbon black discoloration. *See* p. 6, *supra*. Yet the $17.5 million punitive award is over nine times higher. Even if the $1,294,000 award of attorneys' fees for "bad faith" is added to the denominator, as the court of appeals held it should be, the ratio is still 5.5:1.

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[7] See *Seltzer* v. *Morton*, 154 P.3d 561, 611 (Mont. 2007) (permitting $9.9 million in punitive damages where compensatory damages were $1.1 million because "substantial compensatory damages do not always require low single-digit ratios"); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004) (upholding $25 million punitive award, even though compensatory damages were $5.1 million, because 5:1 ratio was not "breathtaking"); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004) (holding, on remand, that 9:1 ratio comported with due process despite compensatory damages of $1 million); *Trinity Evangelical Lutheran Church & Sch.-Freistadt* v. *Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis. 2003) (upholding $3.5 million punitive award that was over seven times the potential harm of $490,000).

Indeed, the Eleventh Circuit's treatment of the attorneys' fees implicates two additional splits. First, the courts are divided as to whether a reviewing court may enhance the denominator by the amount of attorneys' fees. In conflict with the Eleventh Circuit, the Utah Supreme Court has held that *State Farm* precludes doing so.[8]

Second, whether or not it is appropriate to include attorneys' fees in the denominator, the courts are in disarray regarding the significance of a large fee award to the excessiveness inquiry. Taking no account of the fact that an award of attorneys' fees has punitive and deterrent effects,[9] the Eleventh Circuit used the fee award to justify upholding an amount of punitive damages that it might otherwise have found excessive in relation to the compensatory damages.[10] By contrast, the D.C. Court of Appeals has held that, because substantial attorneys' fees include "'a certain punitive element[,]'" they "favor[] a lesser rather than greater award of

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[8] In *State Farm*, the plaintiff argued that the denominator should include over $800,000 in attorneys' fees and expenses in addition to $1 million in compensatory damages. Resp. Br., 2002 WL 31387421, at *17 n.5 (U.S. Oct. 17, 2002). This Court nevertheless stated that the ratio was 145:1 ($145 million to $1 million), not 80.5:1, the ratio if fees and expenses were included. 538 U.S. at 426. On remand, the Utah Supreme Court explained that "the considerable attention given by the Supreme Court to the issue of compensatory damages and the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator." 98 P.3d at 419.

[9] See, *e.g.*, *City of Warner Robins* v. *Holt*, 470 S.E.2d 238, 240 (Ga. Ct. App. 1996) (recognizing that attorneys' fees awarded under Georgia law "may often have a somewhat punitive effect on the party against whom they are awarded" even if their primary purpose is compensatory).

[10] See App., *infra*, 27a (finding it unnecessary to decide whether 9:1 ratio would be constitutional).

punitive damages." *Daka, Inc.* v. *McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003). Similarly, the California Court of Appeal recently held that a 1:1 ratio was the constitutional maximum because the "substantial" emotional-distress damages and attorneys' fees contained a "punitive element." *Walker* v. *Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (Cal. Ct. App. 2007). This Court's review is necessary to resolve these conflicts and provide guidance on the proper application of the ratio guidepost.

C. There Is A Conflict Regarding The Propriety Of Speculating About Severe, But Highly Unlikely, Legislative Fines When Applying The Comparable Penalties Guidepost.

This Court has instructed reviewing courts to consider legislatively established penalties for comparable conduct because principles of comparative institutional competence warrant giving "substantial deference" to "legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (internal quotation marks omitted). In addition, the magnitude of legislative penalties bears on whether the defendant had "fair notice" of the size of the punishment to which it could be subjected. *Id.* at 584. Finally, this guidepost accounts for the fact that juries lack the expertise, perspective, and resources of expert regulatory agencies. As Justice Breyer has aptly put it in an analogous context, it is "anomalous" to "grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring in part and concurring in the judgment).

Perhaps because this Court has not yet provided a detailed analysis of this guidepost, lower courts consistently have expressed confusion about its proper application. As the Third Circuit remarked: "[T]he Supreme Court has not declared how courts are to measure civil penalties against punitive damages, and many courts have noted the difficulty in

doing so. We are similarly unsure as to how to properly apply this guidepost, and we are reluctant to overturn the punitive damages award on this basis alone." *Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005) (citations omitted).

In particular, the lower courts are divided regarding whether it is appropriate to compare the punitive damages to theoretical maximum penalties that are rarely if ever imposed in practice, or whether courts instead must focus on the penalties that realistically could be anticipated for the conduct before them. Though this Court in *State Farm* rebuked the Utah Supreme Court for "speculat[ing] about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment" in the absence of any evidence that those fines realistically could have been imposed (538 U.S. at 428), some lower courts have disregarded this admonition when considering the relevance of highly severe—but also highly unlikely—penalties. See, *e.g.*, *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (noting that "[w]e are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license" even though there was no evidence that such a penalty was remotely possible for the conduct at issue); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir. Jan. 12, 2004) (observing in insurance bad-faith case that "possible civil sanctions for this type of conduct include the suspension or revocation of an insurer's licenses, which * * * could be worth hundreds of millions of dollars"); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 350 (Ark. 2004) (holding in case involving train accident caused by failure to clear vegetation near grade crossing that $25 million punitive award satisfied the third guidepost because it was "comparable" to "the total civil penalties authorized by law," which court determined to be $9.9 million by adding the maximum daily state and federal fines for overgrown vegetation and treating each day as a separate violation).

This case is a perfect example. In analyzing the third guidepost, the Eleventh Circuit relied on a theoretical maximum penalty that was virtually unthinkable in practice: While Alabama's environmental statute authorizes ADEM to impose fines of $25,000 per violation up to a total of $250,000 "per order," the court speculated that ADEM could have issued repeated orders, ultimately fining CCC "several million dollars." App., *infra*, 30a-31a (citing Ala. Code § 22-22A-5(18)(c)). Nothing in the record substantiates the court's assumptions. ADEM never issued any orders because of fugitive emissions by CCC. Moreover, there is no indication that ADEM ever had, ever would, or even could, issue multiple retrospective orders so as to evade the $250,000 limit on its power to punish. Indeed, while the court of appeals stated that "evidence in the record indicates that [CCC] did indeed violate conditions of its permit" (App., *infra*, 31a), there was no evidence quantifying particular emissions. Thus, as the court ultimately admitted, it was engaging in pure conjecture. See *ibid.* (court was not "capable of guessing as to the frequency of Continental's violations").

In contrast, the Sixth Circuit and other courts have focused on more realistic penalties grounded in the evidence before the court. In *Clark*, for instance, a design defect in a truck had contributed to a driver's death. 436 F.3d at 597. Under the version of 49 U.S.C. § 30165(a) in effect at the time, the National Highway Traffic Safety Administration ("NHTSA") could issue fines for design defects of $1,000 per vehicle, up to a maximum of $800,000 for a related series of violations. *Id.* at 608. The district court held that the third guidepost supported the $3 million punitive award because NHTSA could theoretically issue penalties above $800,000 or revoke the defendant's business license in extreme circumstances. *Ibid.* The Sixth Circuit reversed, noting that no evidence in the record showed that such severe penalties were realistic and citing *State Farm*'s warning against engaging in speculation. *Ibid.* The court proceeded to hold that the

"civil penalties that could be imposed for comparable conduct do[] not support the award." *Ibid.*

The Texas Supreme Court similarly refused to consider the possibility that a car dealer would lose its license due to the fraud at issue because the plaintiff "provide[d] no proof that such a sanction has ever been awarded in a case like this." *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 309 (Tex. 2006). Likewise, the Guam Supreme Court concluded that the "'*maximum* fine provided by the statute'" is irrelevant where it "bears no 'relation to the egregiousness of the [fraud in the] case.'" *Park* v. *Mobil Oil Guam, Inc.*, 2004 WL 2595897, at *16 (Guam Nov. 16, 2004). And the Arkansas Court of Appeals held that theoretically severe penalties, such as loss of license, had "no application" because there was no proof that a lesser sanction had been ineffective in the past, and "the record [did not] demonstrate conduct so egregious and so widespread that the civil penalty of business-closure was a real prospect" for the fraud at issue. *Jim Ray, Inc.* v. *Williams*, __ S.W.3d __, 2007 WL 1831790 (Ark. Ct. App. June 27, 2007); cf. *Leatherman Tool Group, Inc.* v. *Cooper Indus., Inc.*, 285 F.3d 1146, 1149 (9th Cir. 2002) (reducing $4.5 million punitive award to $500,000 on remand from this Court because, "even assuming that as a general matter 'severe' awards might be appropriate in some cases, [the plaintiff] has not shown that the award here was comparable to the amount that might have been recovered in civil penalties in a comparable case").

Like the conflicts involving the other *BMW* guideposts, this issue arises with considerable frequency in punitive damages litigation. Environmental cases are one example; often, there are high per-day penalties for statutory violations but no evidence as to the actual number of violations or of the relevant agency's actual fining practice. See, *e.g.*, *Johansen*, 170 F.3d at 1337; *City of Modesto Redevelopment Agency* v. *Dow Chem. Co.*, 2006 WL 2346275, at *14 (Cal. Super. Ct. Aug. 1, 2006) (unpublished). Insurance bad-faith

cases are another example; the statutory scheme often provides for a range of penalties, including the loss of the insurer's license. See, *e.g.*, *State Farm*, 538 U.S. at 428.

This issue also is very important. Many lower courts already tend to treat the comparable penalties guidepost as an inconsequential part of the punitive damages analysis. See, *e.g.*, *Exxon Valdez*, 490 F.3d at 1094 (noting that, "[i]n several recent decisions we have not discussed the [third guidepost] at all," and concluding that third guidepost supported $2.5 billion punitive award solely because "the matter of spilling oil in navigable water has clearly been taken quite seriously by legislatures") (citations omitted); *Kemp*, 393 F.3d at 1364 (the third guidepost "is accorded less weight in the reasonableness analysis than the first two guideposts"); *James* v. *Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006) (stating that statutory penalties have little relevance where they "were set at 'such a low level, there is little basis for comparing it with any meaningful punitive damage award'"); *Campbell*, 98 P.3d at 419 (holding, on remand, that a wide disparity between $9,018,780.75 punitive award and $10,000 maximum legislative penalty for comparable conduct was irrelevant because "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic"); cf. *Steel Techs., Inc.* v. *Congleton*, __ S.W.3d __, 2007 WL 1790599, at *10 (Ky. June 21, 2007) (concluding that the third guidepost supported $1 million punitive award even though maximum fine was $10,000 because the "difference [between the punitive award and maximum fine] is significantly less than that encountered in *Gore* and *Campbell*"). This guidepost will effectively become a nullity if courts can rely on high (but unlikely) theoretical maxima or assume away all possible limitations on the amount of fines, as the Eleventh Circuit did here. Review is necessary to make clear that the Eleventh Circuit should have focused on more realistic penalties.

II. THE ELEVENTH CIRCUIT'S DECISION IS REPRESENTATIVE OF A PERVASIVE FAILURE AMONG THE LOWER COURTS TO HEED THE CONCERNS UNDERLYING THIS COURT'S PUNITIVE DAMAGES CASES.

This case also exemplifies a tendency of many courts to apply the guideposts mechanically without considering the core constitutional problems that led this Court to address this subject in the first place. As this Court has recognized, punitive damages "serve the same purposes as criminal penalties, [but] defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417. Civil juries that are typically subject to few constraints, that lack the expertise of regulators, and that may even possess "biases against big business" (*ibid.*) can all too easily impose multi-million-dollar punitive awards that are "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585) and that dwarf "the size of such awards in the 18th and 19th centuries," even after adjustment for inflation (*Philip Morris*, 127 S. Ct. at 1064).

The Court accordingly has explained that "[i]t should be presumed [that] a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419. Even if some punitive damages are appropriate, the reviewing court should consider whether "a less drastic remed[y] could be expected to achieve [adequate punishment and deterrence]." *BMW*, 517 U.S. at 584.

This guidance reflects the basic understanding that, while punitive damages are an important means of achieving punishment and deterrence, they are not the only way to accomplish those objectives. "Punitive damages aside,"

"[d]eterrence * * * operates through the mechanism of damages that are *compensatory*." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-07 (1986) (emphasis in original).[11] Awards of attorneys' fees also "provide significant deterrence." *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting). And so does injunctive relief. Cf. *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (various costs incurred by defendant as a result of its conduct "should be considered as part of the deterrent already imposed").

Likewise, compensatory damages and awards of attorneys' fees often can have a punitive effect. See *State Farm*, 538 U.S. at 426 ("Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element."); pp. 17-18, *supra*.

The guideposts announced in *BMW* and refined in *State Farm* were supposed to help courts determine when a punitive award exceeds the amount needed to punish and deter and therefore constitutes an arbitrary deprivation of property. Some courts have kept this ultimate inquiry in mind, reducing large punitive awards to an amount at or below the compensatory damages or throwing them out entirely after taking into account the punitive and deterrent effects of the compensatory award and other obligatory payments.

In *Inter Medical Supplies, Ltd.* v. *EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), for instance, the jury

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[11] See also 1 Dan B. Dobbs, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) ("[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931) ("if the 'compensatory' damages are large, the defendant is severely admonished without the addition of any punitive damages").

awarded over $100 million in punitive damages and $48 million in compensatory damages for breach of contract and fraud. The district court reduced the punitive award to $50 million. *Id.* at 454. The Third Circuit held that the reduced punitive award was still unconstitutionally excessive. *Id.* at 467. As the court explained, the plaintiff was not "weak" and "the harm inflicted on [it] was economic * * * and hence 'less worthy of large punitive damages awards than torts inflicting injuries to health or safety.'" *Ibid.* Moreover, "large compensatory damages have been awarded." *Ibid.* The court accordingly held that $1 million was the constitutional maximum because a greater amount was "not 'reasonably necessary to punish and deter.'" *Id.* at 470 (quoting *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991)).

Similarly, in *Chicago Title Insurance Corp.* v. *Magnuson*, 487 F.3d 985 (6th Cir. 2007), the jury awarded $32.4 million in punitive damages and $10.8 million in compensatory damages for tortious interference with a contract. The Sixth Circuit held that a new trial was required on damages, but no punitive damages would be allowed. *Id.* at 998. The court reasoned that there "were no physical injuries or threat to personal safety as a result of [the misconduct]" or any evidence of recidivism. *Id.* at 1001. And the plaintiff "was not a financially vulnerable victim." *Ibid.* Thus, the court held, while there was evidence of malice, this evidence did not by itself prove that "'the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.'" *Ibid.* (quoting *State Farm*, 538 U.S. at 419).

Likewise, in *Pichler* v. *UNITE*, 457 F. Supp. 2d 524 (E.D. Pa. 2006), a federal district court in Pennsylvania denied a request for punitive damages under the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2724. There, a union had violated DPPA by recording certain license plate numbers to get the owners' addresses from motor vehicle records. *Pichler*, 457 F. Supp. 2d at 530. The court held that

punitive damages were inappropriate, even if the union's behavior was willful and reckless. *Id.* at 531. The union had discontinued the illegal activity before judgment and knew that it would have to pay "costly damage awards" for future DPPA violations. *Id.* at 532. This sufficed "to achieve deterrence without imposing punitive damages." *Ibid.* Moreover, the statutory damages were over $4 million, and the attorneys' fees and costs were likely to be "considerable." *Ibid.* These awards would "amply punish[]" the union for its misconduct. *Ibid.* Thus, "mindful" of *State Farm*'s admonition that punitive damages should be awarded only if necessary to achieve punishment or deterrence (*id.* at 531), the court disallowed punitive damages (*id.* at 532).

Regrettably, these decisions are in the minority: Many lower courts have misunderstood (or even affirmatively flouted) this Court's guidance and upheld multi-million-dollar punitive awards even when compensatory damages were "substantial" and "a more modest punishment" would have sufficed. *State Farm*, 538 U.S. at 419-20, 425. The Utah Supreme Court's decision on remand in *State Farm* is illustrative. Though this Court suggested that a punitive award "at or near" the $1 million compensatory award was the constitutional maximum (*id.* at 429), the Utah Supreme Court upheld more than $9 million in punitive damages (98 P.3d at 413).

Another example is the Ninth Circuit's recent decision in *Exxon Valdez*. There, the court allowed $2.5 billion in punitive damages to a class of fishermen following the Exxon Valdez tanker disaster—"the largest punitive damages award affirmed by a federal court" (490 F.3d at 1071 (Kozinski, J., dissenting from denial of rehearing))—even though Exxon spent $2.1 billion remediating the harm, paid $513.1 million in compensatory damages and settlement payments to the plaintiffs, and paid the United States and Alaska $125 million in fines and $900 million for damage to the environment. The dissenting judge, meanwhile, would have upheld the entire $4.5 billion punitive award because it was a single-digit

multiple of the compensatory damages and settlement payments. See *id.* at 1102 (Browning, J., dissenting).

The present case is another excellent example. The $17.5 million punishment here is "many times the size of [punitive] awards in the 18th and 19th centuries" (*Philip Morris*, 127 S. Ct. at 1064) and "is tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585). The most realistic comparable penalty is no more than $250,000 (1/70th of the punitive award). See p. 20, *supra*. And by no means does the misconduct here fall in the upper echelons of reprehensibility. See pp. 11-13, *supra*. Finally, the jury awarded substantial compensatory damages of $1,915,000 as well as $1,294,000 in attorneys' fees for "bad faith," while the district court ordered extensive injunctive relief that has cost CCC millions more. These awards and costs provide significant punishment and deterrence in their own right and eliminate the need for $17.5 million in "further sanctions." *State Farm*, 538 U.S. at 419; see also pp. 23-24, *supra*. The Eleventh Circuit nevertheless upheld the entire punitive award by manipulating the ratio of punitive to compensatory damages to get it into the mid-single digits and reading *State Farm* to allow such ratios whenever there is a "finding of reprehensibility" (App., *infra*, 29a).

These examples are far from unique: Numerous other courts also have missed this Court's point, giving single-digit ratios a constitutional "free pass" even when the compensatory damages exceeded several hundred thousand dollars and a lower punitive award might have satisfied the objectives of punishment and deterrence.[12]

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[12] See, *e.g.*, *Cambio Health Solutions, LLC* v. *Reardon*, 2007 WL 627834, at *7 (6th Cir. Feb. 27, 2007) (unpublished) (upholding $5 million punitive award that was 5.65 times the compensatory damages and prejudgment interest of $884,291.18 because it was "well within the Supreme Court's single-digit prescription"); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004)

The fundamental error of these courts is their belief that the second guidepost is not merely one of several possible indicia of excessiveness, but instead is a safe harbor for massive exactions. That premise seriously misunderstands this Court's precedents. *BMW* indicates that "[i]n most cases, the

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(holding that $2 million punitive award was permissible, even though "the compensatory damages award [of $500,000] is substantial * * * and the punitive damages award is many times [the defendant's] net worth" because this Court approved a 4:1 ratio in *Haslip*); *Rhone-Poulenc*, 345 F.3d at 1372 (Fed. Cir.) (taking no account of the absolute amount of the punitive award and reasoning that the 3.33:1 ratio of punitive to compensatory damages "does not even approach the possible threshold of constitutional impropriety"); *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding $2.6 million punitive award where compensatory damages were $260,000, because the ratio was "slightly more than seven to one" and "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages"); *Bogle* v. *McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (upholding approximately $2 million in punitive damages to each of seven defendants despite "substantial" compensatory damages of $500,000 because the ratio "in this case is in the neighborhood of 4:1, a range which the Supreme Court has found to be 'instructive'"); *Greenberg*, 91 F. App'x at 542 (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 361 (Ark. 2003) (allowing $21 million punitive award that was 4.2 times the remitted compensatory damages of $5 million, because a ratio of 4.2:1 is not "breathtaking"); *Seltzer*, 154 P.3d at 611 (Mont.) (discussed above at p. 16 n.7); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.) (stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003).

ratio will be within a constitutionally acceptable range, and remittitur will not be justified *on this basis*." 517 U.S. at 583 (emphasis added). It does not say that, if the ratio is modest, the punitive award is perforce permissible. Rather, as discussed above, *BMW*, *State Farm*, and *Philip Morris* all suggest a broader concern with the risk of arbitrariness that arises when the *absolute* amount of punitive damages exceeds the fine that would be imposed in a criminal proceeding attended by full criminal safeguards or in an administrative proceeding supervised by an expert agency.

This Court's cases also reflect the paramount principle that no award should be greater than reasonably necessary to serve the State's goals of deterrence and retribution. Application of that limiting principle necessarily entails considering the deterrent effect of other forms of liability imposed upon the defendant as a consequence of its punishable conduct. The courts that treat the ratio guidepost as a safe harbor have lost sight of this critical consideration entirely.

Because the Eleventh Circuit committed precisely that error here, review is warranted to make clear that a single-digit ratio is not a free pass. This case presents an excellent opportunity to remind the lower courts that they must scrutinize the *absolute* size of punitive awards to ensure that fines that could or would never be imposed by a criminal sentencer or expert administrative agency are not levied through the civil process with its comparatively *weaker* protections and that, in determining whether an award is excessive, they must take account of other deterrents faced by the defendant.

III. THIS COURT SHOULD GRANT PLENARY REVIEW IN BOTH THIS CASE AND *EXXON VALDEZ* OR, ALTERNATIVELY, GRANT REVIEW IN ONE AND HOLD THE OTHER.

As discussed above, the Eleventh Circuit's analysis of the ratio and reprehensibility guideposts relied on the Ninth Circuit's decision in *Exxon Valdez*. App., *infra*, 26a, 29a.

Exxon has recently filed a petition for certiorari, arguing, among other things, that the Ninth Circuit's treatment of the ratio and comparative penalties guideposts was fundamentally unsound. See *Exxon Shipping Co.* v. *Baker*, No. 07-219. Given the similar issues raised by these cases, the Court should grant plenary review in both to provide maximum guidance to the lower courts. In recent years, this Court has followed this practice in cases involving constitutional challenges to school assignment plans,[13] criminal sentencing,[14] and religious displays.[15] Granting both petitions is especially warranted here because, as in *Philip Morris*, Exxon has raised issues that, if decided in its favor, would make it unnecessary for this Court to reach Exxon's excessiveness arguments.

At minimum, the Court should grant review in one of the cases and hold the other. See Robert L. Stern et al., SUPREME COURT PRACTICE § 4.16, at 255 (8th ed. 2000) ("Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.").

CONCLUSION

The petition for a writ of certiorari should be granted.

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[13] *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 126 S. Ct. 2351 (2006); *Meredith* v. *Jefferson Cty. Bd. of Educ.*, 126 S. Ct. 2351 (2006).

[14] *Rita* v. *United States*, 127 S. Ct. 551 (2006); *Claiborne* v. *United States*, 127 S. Ct. 551 (2006).

[15] *McCreary Cty.* v. *ACLU*, 543 U.S. 924 (2004); *Van Orden* v. *Perry*, 543 U.S. 923 (2004).

Respectfully submitted.

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AUGUST 2007

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APPENDIX A

United States Court of Appeals, Eleventh Circuit.
ACTION MARINE, INC., John Tharpe, et al., Plaintiffs-Appellees,
v.
CONTINENTAL CARBON INCORPORATED, China Synthetic Rubber Corporation, Defendants-Appellants.
No. 06-11311

March 21, 2007

Before DUBINA and WILSON, Circuit Judges, and CORRIGAN,* District Judge.

DUBINA, Circuit Judge:

Appellants, Continental Carbon Co., Inc. ("CCC"), and its parent company, China Synthetic Rubber Corp. ("CSRC") (collectively, "Continental"),[1] defendants in the underlying lawsuit, appeal the district court's denial of their post-trial motion for judgment as a matter of law or, in the alternative, a new trial or, in the alternative, an amendment of the final judgment (hereinafter "post-trial motion"). Having reviewed the parties' briefs and the evidence in the record, and with the benefit of oral argument, we affirm the district court's order and the judgment entered on the jury's verdict.

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* Honorable Timothy J. Corrigan, United States District Judge for the Middle District of Florida, sitting by designation.

[1] CSRC's relationship with CCC was the subject of some dispute during this litigation, including the trial; however, in this appeal, CSRC does not challenge the district court's finding that it is CCC's parent corporation, and CSRC does not now deny making decisions that exposed it to liability in the instant case. Nor do the defendants contend that information known by CCC's management should not be imputed to CSRC.

I. BACKGROUND

A. *Facts*

Continental owns and operates a manufacturing plant in Phenix City, Alabama, that produces carbon black, a substance the company describes as follows:

> a highly engineered product manufactured by heating feedstock oil to a high temperature in a low-oxygen reactor. The resulting product is smoke that includes both carbon black and waste gases. The carbon black is separated from the gases, processed, and formed into small pellets for ease of handling and shipment. [Continental] sells carbon black for use in making tires, rubber and plastic items, inks, and other . . . products.

[Appellants' Br. at 3 (citations to the record omitted)].

According to trial testimony, the separating process occurs in stages using filters located in what is known in the industry as bagfilter compartments. Pressurized smoke carries carbon black through the compartments, where the bagfilters capture the carbon black. In a closed system such as exists in the Phenix City plant, if everything is working perfectly, no carbon black should escape, and the remaining gasses are expelled through exhaust towers.

Originally, the Phenix City plant housed one production unit ("Unit 1"). Although Continental received complaints from neighboring property owners regarding carbon black emissions from this unit, the damage giving rise to the present lawsuit occurred in conjunction with Continental's efforts to double the plant's production by commissioning a second unit in 1999 ("Unit 2"). Along with the construction of Unit 2, Continental installed a thermal oxidizer for the purpose of combusting any carbon black particles that escape either production unit before the air emanating from the bagfilter compartments is expelled.

The appellees (collectively, "the property owners"), which include the City of Columbus, Georgia ("the City"), own property located across the Chattahoochee River and within approximately 1 1/2 miles from Continental's Phenix City plant.[2] The property owners, all of whom are Georgia citizens, also include Action Marine, Inc. ("Action Marine"), which during the relevant time operated a retail boat sales and maintenance business along the river; John Tharpe ("Tharpe"), Action Marine's sole shareholder and principal agent; and Owen Ditchfield ("Ditchfield"), who owns a residence and rental home in the area.

According to the property owners, the Phenix City plant repeatedly emitted carbon black into the air, which then carried the pollutant, known to be oily, adhesive, and penetrating, onto their properties, thereby darkening them. Specifically, the City contends that the carbon black damaged the Columbus Civic Center both externally and internally via the facility's air intake system. Other City-owned properties allegedly damaged include recreational facilities located in the City's South Commons Sports and Entertainment Complex as well as Rigdon Park. In pursuing this civil action, the City sought damages for cleanup and monitoring costs. Ditchfield sought damages for cleanup costs, diminution of property value, and emotional distress in connection with carbon black contamination of both of his properties.

Action Marine alleges that the carbon black damaged its inventory of boats to such an extent that the company was forced to sell those it could at a loss. Creditors eventually repossessed Action Marine's boat inventory, which Tharpe had personally guaranteed, and the business shut down. Action Marine sought damages to recover for the lost value of its business.

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[2] Some of the properties are only approximately a 1/2 mile from Continental's Phenix City plant.

When Action Marine's creditors failed to recoup all that was owed from the company, they pursued deficiency judgments against Tharpe personally. To make matters worse, unable to return customers' boats in a clean condition and thought by some to be selling used boats as new, Tharpe became the butt of jokes among the fishermen who had formerly patronized his business. Tharpe therefore sought damages for emotional distress and loss of reputation.

Importantly, the property owners accused Continental of intentionally damaging their properties. They claimed that Continental chose to continue operating its Phenix City plant despite knowing that the plant's constant leaks were polluting their properties. Rather than fix the leaks, the property owners contend, Continental engaged in a strategy of denial, deception, and subterfuge. Therefore, the property owners sought punitive damages.

B. *Procedural History*

Alleging diversity jurisdiction pursuant to 28 U.S.C. § 1332 (2000), Action Marine and Tharpe originally filed this lawsuit as a class action stating common law tort claims of negligence, wanton conduct, breach of duty to warn, fraud, misrepresentation, deceit, nuisance, trespass, and strict liability. In addition to Continental, named defendants included Taiwan Cement Corp. ("Taiwan") as well as Charles Barry Nicks ("Nicks") and Todd Miller ("Miller"), both individually and in their representative capacity as agents of Continental.

Eventually, the City, Ditchfield, and Phillips Homes, Inc. ("Phillips"), were added as plaintiff class representatives, but the district court subsequently denied class certification. The district court then granted summary judgment in favor of Taiwan and the individual defendants, Nicks and Miller, on all claims against them. The court also granted summary judgment in favor of the remaining defendants on the claims of fraud, misrepresentation, deceit, and strict liability as well

as the City's and Action Marine's claims for emotional distress. Phillips stipulated to a dismissal of its claims without prejudice, and the remaining plaintiffs acquiesced in the dismissal of the claim alleging a breach of a duty to warn. Therefore, the lawsuit proceeded to trial on the property owners' claims of negligence, wanton conduct, nuisance, and trespass.

After a 10-day trial, an Alabama jury returned a verdict in favor of the property owners on all claims and determined that Continental's actions warranted punitive damages. The jury awarded compensatory damages in the amounts of $45,000 to Ditchfield; $100,000 to Tharpe; $570,000 to the City; and $1.2 million to Action Marine for a total of $1,915,000. The jury also awarded $1,294,000 in attorney fees and assessed punitive damages at $17.5 million.

Following entry of the final judgment on the jury's verdict, Continental timely filed its post-trial motion challenging the sufficiency of the evidence presented in support of the tort claims as well as the amount and propriety of the compensatory and punitive damages awarded. Prior to ruling on the motion, the district court determined that the property owners were entitled to permanent injunctive relief, to which the parties later consented. Approximately six months after entry of final judgment on the claims for injunctive relief, the district court denied Continental's post-trial motion. Continental now appeals that decision.[3]

II. ISSUES

1. Whether the evidence was sufficient to reasonably infer that carbon black was a cause-in-fact of the alleged discoloration.

2. Whether the evidence was sufficient to reasonably infer that Continental acted with the mental state required by

[3] Continental concomitantly appealed the award of injunctive relief; we have already dismissed that aspect of the appeal as untimely.

Georgia law to prove the property owners' claims and lift Georgia's statutory cap on punitive damages awards.

3. Whether the compensatory damages awarded to Action Marine were improper.

4. Whether Tharpe, as personal guarantor of Action Marine's debt and its principal agent, may pursue a claim against Continental for emotional distress and/or loss of reputation.

5. Whether the punitive damages award was unconstitutionally excessive.

III. STANDARDS OF REVIEW

We review the "denial of a motion for judgment as a matter of law *de novo*, and will reverse only if 'the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict.'" *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 n. 12 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 2967 (2006). *De novo* review is the proper standard also for reviewing the district court's denial of judgment as a matter of law with respect to the claims for punitive damages. *Boyd v. Homes of Legend, Inc.*, 188 F.3d 1294, 1298 n. 9 (11th Cir. 1999) (noting that the issue "presents a pure question of law"); *see also Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000).

The district court's denial of a motion for a new trial is reviewed for an abuse of discretion. *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1247 (11th Cir. 2001). "Deference to the district court 'is particularly appropriate where a new trial is denied and the jury's verdict is left undisturbed,'" as in this case. *Id.* at 1247-48 (quoting *Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987)).

Finally, the district court's decision to sustain the amount of compensatory and punitive damages awards pursuant to state law is reviewed for "clear abuse of discretion."

Middlebrooks, 256 F.3d at 1249. Its decision that the punitive damages award does not run afoul of the federal Constitution, however, is subject to *de novo* review, though we "defer to the District Court's findings of fact unless they are clearly erroneous." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436, 440 n.14, 121 S. Ct. 1678, 1685-86, 1688 n.14 (2001).

IV. DISCUSSION

A. *Causation*

Continental contends that the evidence at trial was insufficient to support an award with respect to any of the property owners' tort claims. Focusing solely on the scientific evidence offered through the parties' experts, Continental argues that the property owners failed to prove that carbon black, as opposed to other ostensibly dark substances, caused any of the damage alleged. Alternatively, according to Continental, the scientific evidence similarly failed to demonstrate that the damage attributable to carbon black was "substantial," which Continental argues is required to prove the trespass and nuisance claims.

1. *In General*

According to Continental, chemical analyses conducted by the parties' experts failed to establish the presence of any carbon black on several of the City's properties at issue and, with respect to all but one of the remaining properties, established a concentration of less than one percent of the total dark material on the property. Consequently, Continental contends, the testing proved at most that carbon black caused *de minimis* damage.

At oral argument, the property owners conceded that two of the properties allegedly damaged, for which the jury awarded compensatory damages, tested negative for carbon black but contended nonetheless that the location of these two properties and the similarity between their discoloration and that of the neighboring properties that tested positive for

carbon black allow for an inference that carbon black caused the damage alleged.[4] The property owners rely on circumstantial evidence as well to counter Continental's claim that the positive test results revealed only trace amounts of carbon black.

The scope of our inquiry is defined by the arguments raised in the parties' briefs. Importantly, Continental does not dispute that all of the properties at issue were discolored and does not contend that the discoloration itself was insubstantial. Nor does Continental contend that the observable discoloration of the properties differed materially from one property to another. Furthermore, Continental does not attempt to convince us that the discoloration was not *suggestive* of carbon black.[5] Instead, Continental contends that no reasonable

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[4] The property owners focus on the issue of proximate cause. Continental's relevant arguments are limited to the issue of factual causation, however, and Continental actually acknowledges that cases addressing the issue of proximate cause "are inapposite." [Reply Br. at 7 n.6]. Therefore, we are concerned only with factual causation.

[5] Continental denies the ability to accurately identify carbon black with the naked eye; however, evidence in the record includes contradictory testimony from CCC employees. For example, Ng-Leng Lee, a plant manager for CCC and at one time plant manager in Phenix City, testified at his deposition that he believed CCC employee Greg Johnstone, who had reported a complaint of carbon black fallout, was capable of recognizing carbon black pollution upon seeing it. In addition, Nicks testified that he paid a car dealership with his own money to have cars cleaned after inspecting the vehicles and satisfying himself (though not to a scientific certainty) that the cars had been blanketed with carbon black from the Phenix City plant. Also, the property owners' microscopist, Garth Freeman, Ph.D., who specializes in carbon analysis, testified that the effects of carbon black deposits are visible without a microscope and "can form a comet appearance when it lands on material, and so in some circumstances there are physical appearances

fact finder could conclude that the discoloration was in fact caused by carbon black without a chemical analysis establishing the presence of carbon black in such concentrations as to compel the conclusion that carbon black, and nothing else, caused the alleged discoloration.

Our substantive legal analysis in this diversity case is governed by Georgia law, which provides that "[a]s a general rule, issues of causation are for the jury to resolve and should not be determined by a trial court as a matter of law except in plain and undisputed cases." *Ogletree v. Navistar Int'l Transp. Corp.*, 535 S.E.2d 545, 548 (Ga. Ct. App. 2000).

> With respect to factual causation . . . [, while] a reasonable inference sufficient to create a trial issue of fact cannot be based on mere possibility, conjecture, or speculation . . . [, t]he plaintiff [need only] . . . introduce evidence which affords a *reasonable basis* for the conclusion that it is more likely than not that the conduct of the defendant was *a* cause in fact of the result.

Id. (citations & quotations omitted) (emphasis added).

Viewed in the plaintiffs' favor, the evidence at trial, which included numerous documents and photographs as well as testimony from Ditchfield, Tharpe, the Mayor of Columbus, employees (past and present) of CCC, and experts in microscopy, air quality, and wind direction modeling, tended to show that (1) Continental's Phenix City plant emitted carbon black on numerous, perhaps innumerable, occasions during the relevant time period; (2) wind carrying carbon black from the Phenix City plant frequently blew toward the property owners' properties; (3) the properties were in close proximity to the plant; (4) the properties all were similarly discolored; and (5) the dark substance on the properties was at least

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of the way carbon black might deposit that would strongly indicate that that was carbon black." [Trial Tr. at 862].

reasonably suggestive of carbon black. Furthermore, most of the samples the property owners' expert obtained from the properties tested positive for carbon black, and the properties that tested negative were located immediately adjacent to properties with positive test results.

Surely a fact finder would welcome a chemical analysis establishing to a scientific certainty the presence and precise concentration of the pollutant on the properties allegedly damaged. In the instant case, the jury was free to hold the property owners accountable for failing to provide such certainty, but Continental has failed to cite any Georgia case that requires the property owners to establish scientific certainty.[6] We conclude that such precision is not necessary in this case. The evidence in the record provides a reasonable basis for concluding that Continental's carbon black caused the discoloration alleged.[7] Georgia law requires nothing more.

2. *Substantial Damage*

Continental contends that the property owners cannot succeed on their trespass and nuisance claims unless they can prove that the damage caused by carbon black was "substantial." [Appellant's Br. at 20]. We do not need to decide whether Continental's view of Georgia law is correct.

As already noted, Continental does not contend that the discoloration alleged by the property owners was insubstantial. Relying again on the results of the microscopic analyses

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[6] *Satterfield v. J.M. Huber Corp.*, 888 F. Supp. 1567, 1570-71 (N.D. Ga. 1995), the case on which Continental primarily relies, is inapposite because the *Satterfield* court relied on a lack of evidence, generally, and specifically noted the lack of any expert testimony whatsoever regarding the issue of causation.

[7] We note that the only other circuit to address a similar argument in a case factually on point is in agreement. *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 173-74 (5th Cir. 1997) (concluding that scientific testing was not required for a jury to infer the presence of carbon black).

conducted by the parties' experts, Continental merely contends that the property owners failed to demonstrate that carbon black was the cause of this damage. Because we have already determined that the property owners' circumstantial evidence was sufficient to prove that carbon black caused the discoloration, it follows that the evidence also was sufficient to prove that carbon black caused substantial damage to all of the properties. *Holman v. Athens Empire Laundry Co.*, 100 S.E. 207, 210 (Ga. 1919) (holding that for smoke to constitute a nuisance "it must be such as to produce a visible, tangible, and appreciable injury to property").

B. *Continental's Culpability*

Continental contends that the evidence was insufficient to satisfy the scienter requirements of the property owners' wanton conduct, trespass, and punitive damages claims as well as that which is necessary to overcome Georgia's cap on punitive damages. The latter standard requires a showing of "specific intent to cause harm" and thus erects the highest scienter obstacle the property owners needed to overcome.[8]

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[8] "[W]anton conduct is that which is 'so reckless or so charged with indifference to the consequences . . . as to justify the jury in finding a wantonness equivalent in spirit to actual intent.'" *Hendon v. DeKalb County*, 417 S.E.2d 705, 712 (Ga. Ct. App. 1992) (quoting *Truelove v. Wilson*, 285 S.E.2d 556, 559 (Ga. Ct. App. 1981)), *quoted in Chrysler Corp. v. Batten*, 450 S.E.2d 208, 212 (Ga. 1994). Trespass to personal property requires a showing of willful damage, O.C.G.A. § 51-10-6(a) (2000), which equates to an "actual intention to do harm or inflict injury." *Hendon*, 417 S.E.2d at 712. A showing of either willfulness or wantonness is sufficient to satisfy the standard for awarding punitive damages. O.C.G.A. § 51-12-5.1(b) (2000). We note also that the property owners must prove their entitlement to punitive damages with clear and convincing evidence. O.C.G.A. § 51-12-5.1(b).

Continental has waived its argument on appeal that, under Georgia law, the tort of wanton conduct applies only in conjunction with a risk to "human life." [Appellant's Br. 12]. Continental

O.C.G.A. § 51-12-5.1(f), (g) (2000). A showing of specific intent to cause harm necessarily would satisfy the other scienter requirements; therefore, we begin our analysis with Continental's argument that Georgia's statutory cap limiting punitive damages requires us at least to grant a remittitur. Because we conclude from the record that the evidence was sufficient to prove that Continental acted with specific intent to cause harm, it is unnecessary to discuss Continental's arguments concerning the other scienter requirements.

Preliminarily, we recognize that an appellant challenging a jury finding regarding an actor's state of mind faces a formidable hurdle. We long ago cautioned courts in granting judgment as a matter of law "when resolution of the dispositive issue requires a determination of state of mind. Much depends on the credibility of the witnesses testifying as to their own states of mind." *Croley v. Matson Navigation Co.*, 434 F.2d 73, 77 (5th Cir. 1970).[9] Accordingly, we afford great deference to the jury's relevant conclusions as well as those of the district judge first asked to overturn the jury's finding.

1. *The Meaning of Specific Intent to Cause Harm*

By statute, Georgia caps punitive damages at $250,000 per plaintiff unless "it is found that the defendant acted, or failed to act, with the specific intent to cause harm." § 51-12-5.1(f), (g); *see also Bagley v. Shortt*, 410 S.E.2d 738, 739

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failed to object to the district court's relevant jury instruction or raise this argument before the district court in its post-trial motion. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331-35 (11th Cir. 2004) (discussing this circuit's frequently applied rule that we will not consider "an issue . . . raised for the first time in an appeal").

[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

(Ga. 1991) (holding that the cap establishes a limit on the amount that can be awarded "*any one plaintiff*"). Reading into the term "specific intent" a requirement that the property owners demonstrate that Continental acted for the sole nefarious purpose of injuring them, both Continental and the U.S. Chamber of Commerce ("Chamber"), as *amicus curiae*, contend that the property owners fell short. Continental has waived a key aspect of this argument, however.

At trial and without objection, the district court instructed the jury that "[s]pecific intent to cause harm is where the actor desires to cause the consequences of his act or where the actor believes that the consequences of his act are substantially certain to result from [it]." [Trial Tr. 2,027]. This language reflects, *verbatim*, the definition adopted by the Georgia Court of Appeals, which equates specific intent in the punitive damages context to intent as defined in the Restatement (Second) of Torts. *See J.B. Hunt Transport, Inc. v. Bentley*, 427 S.E.2d 499, 504 (Ga. Ct. App. 1992); *Viau v. Fred Dean, Inc.*, 418 S.E.2d 604, 608 (Ga. Ct. App. 1992); Restatement (Second) of Torts § 8A (1965); *see also* Council of Superior Court Judges, Georgia Suggested Pattern Jury Instructions, Vol. I: Civil Cases, § 66.711 (4th ed. 2004) (suggesting the same definition as that the district court utilized in this case and the Georgia Court of Appeals utilized in *Bentley* and *Viau*).

Continental now contends that specific intent requires something more. In essence, Continental and the Chamber contend that the consequences of Continental's actions or inaction must have been not only substantially certain to result but also the end purposely sought. Thus, to avoid the cap, according to Continental and the Chamber, the property owners must demonstrate that Continental continued to operate its leaky facility *in order to* pollute the property owners' properties rather than, for example, to make or save money.

At trial, Continental failed to object to the relevant jury instruction and later failed to raise this same argument in its

post-trial motion. Indeed, Continental's brief in support of its post-trial motion unequivocally adopted the district court's definition after noting Georgia's reliance on the Restatement. [Br. in Supp. of Defs.' Post-Trial Mot. at 20]. Not only has Continental failed to acknowledge its lack of objection to the jury instructions, but it has also failed to argue for the application of one of the exceptions to our rule regarding a party's waiver of an issue raised for the first time on appeal. *See, e.g., Access Now, Inc.*, 385 F.3d at 1331-35; *see also supra* note 8. Moreover, in its brief on appeal, Continental neither expressly challenges the district court's jury instruction nor requests a review of the instruction for plain error. *See* Fed. R. Civ. P. 51(c) & (d). Consequently, Continental has waived this argument.[10]

We therefore decline to consider whether Continental's proffered definition of "specific intent," to the extent it diverges from the definition provided by the district court, is correct. Instead, we review the evidence in the record to determine whether it allows for an inference that Continental at least believed that the contamination was "substantially cer-

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[10] We disagree with Continental's contention that we must entertain its argument anyway and find that the cases upon which Continental relies have no bearing in this case. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 513-14, 108 S. Ct. 2510, 2519-20 (1988) (concluding only that it was not impermissible for the Fourth Circuit Court of Appeals to issue a ruling based on a legal standard different from the standard provided in the district court's jury instructions); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 120, 108 S. Ct. 915, 922 (1988) (holding that the defendant's failure to object to a jury instruction would not foreclose review of the relevant legal issue raised on appeal when the defendant's "legal position in the District Court . . . was consistent with the legal standard it" advocated on appeal, and the Court of Appeals had "very clearly considered, and decided," the issue on appeal).

tain" to result from its actions or inaction. We conclude that the evidence was sufficient to support such a finding.[11]

2. *Sufficiency of the Evidence*

The evidence at trial demonstrated that by the late 1990s, if not sooner, Continental was aware that Unit 1 had fallen into a state of disrepair, a condition Nicks, the Phenix City plant manager from 1999 to 2004, agreed was "deplorable." [Trial Tr. at 389]. In 1998, Ken Wilder, at the time the Phenix City plant manager, along with Todd Miller, then CCC's Corporate Director of Safety, Health, and Environmental Affairs, attended a citizens meeting at the Columbus City Manager's office. [Pls.' Ex. 2]. According to Wilder's notes, which he submitted in a memorandum to Nicks, the purpose of the meeting was to discuss complaints of pollution that the citizens apparently believed was carbon black. The citizens provided detailed descriptions of the fallout on their property, and Ditchfield discussed problems he had been having since 1982. Notably, Wilder's memorandum acknowledged that "[i]n 1982 the plant had a problem resulting in carbon black on residents[' homes] in the Oakland Park area. Continental Carbon paid to have the homes of residents cleaned." [Pls.' Ex. 2-1]. Nevertheless, pointing to chemical analyses conducted by McCrone Associates, Inc., and referring to the "elemental composition" of the samples tested, Wilder assured the attendees that the pollution was not carbon black despite knowing that at least one of McCrone's previous analyses suggested that it was.[12]

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[11] Continental similarly waived its current arguments that it lacked notice of the possibility that the district court would interpret the specific intent requirement as it did and that the Rule of Lenity compels an alternate interpretation.

[12] Approximately one year before the meeting with the Columbus citizens, CCC had submitted a sample of dark material from Action Marine to McCrone for an analysis. McCrone shared the results with Gary Shafer, then the Phenix City plant's Director of

Apparently dissatisfied with Continental's explanation, the complaints continued, and Nicks, after becoming plant manager, grew increasingly disgusted with the condition of the facility. Around that same time, two separate teams of CCC employees, one of which included Nicks, evaluated Unit 1 and recommended destructing and rebuilding the system almost entirely. CSRC then sent a team of its own, which arrived at a different conclusion and recommended not rebuilding Unit 1.[13] Continental scrapped the project and did not resume meaningful efforts to resuscitate the rebuilding plan until 2004. Even then, internal company E-mails re-

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Safety, Health, and Environmental Affairs. According to McCrone's report, the carbon black reference sample provided by CCC contained primarily carbon and a trace of sulfur. The Action Marine sample contained, *inter alia*, carbon and sulfur, which McCrone somewhat dismissively concluded "may indicate a trace of your carbon black." [Pls.' Ex. 80-1].

At trial, Nicks testified regarding this analysis and described McCrone as an "independent laboratory." [Trial Tr. at 287]. The jury was free to conclude otherwise. In a facsimile transmission to Tharpe informing him of the test results, McCrone described the elemental composition of the sample, including the existence of carbon and sulfur. Despite having already conveyed to CCC the possibility that the sample contained carbon black, McCrone's note to Tharpe concluded, "Therefore, although the black particulate on the wipe looks like the carbon black both visually and with the microscope, *the elemental data show the two to be different.*" [Pls.' Ex. 80-2] (emphasis added). At trial, Nicks acknowledged that the information provided by McCrone to Tharpe was inconsistent with the information McCrone provided to CCC and agreed that one possible explanation was that McCrone had lied for CCC. [Trial Tr. at 292].

[13] Continental anticipated that rebuilding Unit 1 would cost in excess of $4 million. All expenditures exceeding $200,000 required the approval of CSRC president Peter Wu, Ph.D., who also served as CCC's chief executive officer and vice-chairman of its board.

vealed, Continental planned to extend completion of the project to at least 2006.

In 1999, Continental constructed Unit 2 and installed the thermal oxidizer. When developing plans for Unit 2, Continental made an economic decision to limit the number of bagfilter compartments, thereby rendering Unit 2 incapable of sustaining the flow of air needed to maintain acceptable production levels. Rather than reduce production, however, Continental overloaded Unit 2, and the bagfilters, which the manufacturer designed to last one year, began splitting and leaking in half that time. Indeed, some evidence suggested that the bagfilters failed after only three or four months.

Emissions and complaints continued despite the operation of the thermal oxidizer, the supposed catchall. In April 2001, in response to complaints from Tharpe, an investigator with the U.S. Environmental Protection Agency sat across the river from the Phenix City plant and documented a carbon black emission from two exhaust stacks that CCC had not even received a permit to operate. Nicks later became aware that samples taken from Action Marine following the emission tested positive for carbon black. Approximately six months later, with no steps having been taken to correct the problems with Unit 2, Nicks sent an e-mail, copied to Juan D. Rodriguez, at the time CCC's senior vice-president of operations, describing Unit 2 as "constantly operating with some small leak up to a[n] intolerable leak." [Pls.' Ex. 5]. Nevertheless, Continental did not finally approve the addition of two bagfilter compartments until July 2002, approximately ten months later.

Continental's attitude regarding carbon black emissions was further evidenced by its failure to attempt to accurately monitor the carbon black being released into the environment. Nicks testified that he had no means of determining how much carbon black his facility released into the air. According to Nicks, the plant relied solely on employees' visual observation to determine whether any black smoke drifted

from the facility. Nobody was assigned to monitor the emissions on a full-time basis, however, and testimony confirmed that visually monitoring black emissions at night from the plant was virtually impossible.

The plant did utilize an alarm system designed to detect solid and liquid particles in the exhaust plumes; however, according to Randy Wangle, a former maintenance superintendent at the Phenix City plant, Continental had a policy of simply cleaning and resetting the alarm without addressing leaks unless the alarm sounded several times within an hour.

We have closely reviewed the massive record in this case, and, as the foregoing discussion demonstrates, we conclude that the evidence, which was clear and convincing, was more than sufficient to demonstrate that Continental operated the Phenix City plant and failed to correct the problems plaguing it with the "specific intent to cause harm" to the property owners, as that term is defined by the jury instructions which govern this case.[14]

C. *Compensatory Damages*

1. *The Proper Measure of Action Marine's Damages*

The purpose of compensatory damages is "to place an injured party in the same position as it would have been in had there been no injury . . ., that is, to compensate for the injury actually sustained." *Home Ins. Co. v. N. River Ins. Co.*,

[14] The cases upon which Continental primarily relies do not compel a different outcome. *See Wal-Mart Stores, Inc. v. Johnson*, 547 S.E.2d 320, 322-25 (Ga. Ct. App. 2001) (concluding that the evidence was sufficient to find that the defendant, Wal-Mart, acted with specific intent to harm the plaintiff despite evidence that would allow a fact finder to conclude that the plaintiff was the victim of poor communication and confusing circumstances); *Bentley*, 427 S.E.2d at 505 (finding that the cap applied in a case involving injuries caused by an exhausted truck driver); *Viau*, 418 S.E.2d at 608 (finding that the cap applied in a case involving injuries caused by an intoxicated driver).

385 S.E.2d 736, 742 (Ga. Ct. App. 1989). Continental contends that the damages awarded to Action Marine improperly include a windfall of approximately $800,000 in debt incurred in the ordinary course of business. This argument does not take into account the evidence that Continental's actions led to Action Marine's demise and thus its inability to generate revenue and repay its debts.[15] Although the parties fail to cite relevant Georgia law, the Georgia Supreme Court rejected an argument similar to Continental's in circumstances sufficiently similar to the instant case for this court to do the same. *See Bennett v. Smith*, 267 S.E.2d 19, 19-20 (Ga. 1980).[16]

Without objection from Continental, at trial Action Marine presented as an expert Edward Sauls, who was at the time a certified public accountant, certified valuation analyst with an accreditation in business valuation, and a certified financial forensic analyst. In great detail, Sauls explained to the jury the basis for his conclusion that an award of $1.2 million was necessary to "place [Action Marine and its owner, Tharpe] in the position financially that they otherwise

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[15] Continental does not challenge the sufficiency of the evidence linking its carbon black to Action Marine's closing beyond what has already been discussed. Therefore, we assume without deciding that Action Marine proved that the discoloration of its boats proximately caused its insolvency.

[16] Not entirely analogous, *Bennett* is nonetheless instructive. The plaintiffs in *Bennett* operated an egg farm and contended that the defendants had sold them contaminated feed, which "caused the plaintiffs' hens to stop laying eggs." *Id.* at 19. After distinguishing the case from more typical breach of contract cases involving incomplete transactions, the Georgia Supreme Court concluded that the plaintiffs could recover "lost revenues as damages *without deducting production expenses therefrom*, since the plaintiffs' evidence showed that they incurred the same expenses they would have incurred had the hens continued to lay eggs." *Id.* at 20 (emphasis added).

would have been had it not been for the actions of the Defendant." [Trial Tr. at 1097]. In other words, he testified as to "what . . . Action Marine [would] be worth today had they not lost . . . profits." [Trial Tr. at 1110].

He further explained the three common "approaches to valuation" and led the jury through his application of the "asset-based" approach. Essentially, based on what Sauls concluded Action Marine would be worth but for Continental's conduct, he determined that a purchaser as of the trial date would assume Action Marine's liabilities of $795,243 and pay an additional $653,166 for a total of $1,448,409. He further reduced the total to account for variables that are not important here and concluded that $1.2 million would be necessary to compensate Action Marine for the pollution damage. [Trial Tr. at 1117-18].

On cross-examination, Continental did not challenge Sauls's valuations and focused solely on the basis for his conclusion that Action Marine's losses were attributable to the carbon black contamination. Moreover, Continental neither offered an alternative methodology nor presented an expert of its own to provide a different quantum of damages. Continental now contends that Sauls's application of the asset-based approach was incorrect. We disagree. *See Dunn v. Comm'r of Internal Revenue*, 301 F.3d 339, 352-53 (5th Cir. 2002) (approaching asset-based valuation from the perspective of a "willing buyer"); *Okerlund v. United States*, 53 Fed. Cl. 341, 347 n.4 (Fed. Cl. 2002) ("Under the asset based approach, the value of a business is equal to the cost that would be incurred in acquiring a group of assets of similar utility"). Even if Sauls was mistaken in his calculations, Continental had every opportunity to highlight his error for the jury.

We conclude that the district court did not err in denying Continental's motion for remittitur or a new trial on damages. Action Marine's proffered measure of damages did not impermissibly include damages not attributable to Continen-

tal's carbon black, and the expert testimony was sufficient to support the compensatory damages awarded.

2. *Tharpe's Ability to Recover Damages*

Continental contends that Tharpe may not recover damages because his injuries, as sole shareholder of Action Marine, are derivative of his company's injuries. Again, we disagree. In Georgia, a sole shareholder's status as personal guarantor of his corporation's debt gives rise to an independent, legally compensable injury when tortious acts directed at the corporation injure the shareholder in that capacity. *William Goldberg & Co., Inc. v. Cohen*, 466 S.E.2d 872, 881-82 (Ga. Ct. App. 1995). Continental offers no reason to believe that a similar rationale would not apply with respect to the independent injuries inflicted upon Tharpe's business reputation, which was so intertwined with that of his corporation as to be virtually inseparable. *See* O.C.G.A. § 41-1-1 (1997) ("A nuisance is anything that causes hurt, inconvenience, or damage to another . . . ."); *Anderson v. Fussell*, 44 S.E.2d 694, 696 (Ga. Ct. App. 1947) ("The body, reputation, and property of the citizens are not to be invaded without responsibility in damages to the sufferer."); *cf. Curl v. First Fed. Sav. & Loan Ass'n of Gainesville*, 257 S.E.2d 264, 265-66 (Ga. 1979) (upholding a jury verdict in favor of a plaintiff in a wrongful foreclosure suit seeking damages for, *inter alia*, injury to her reputation in the community). Therefore, we conclude that the district court did not err in allowing Tharpe's claims to go to the jury.

D. *Constitutionality of the Punitive Damages Award*

"Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *B.M.W. of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 1595 (1996).[17] "It should be

[17] Georgia law allows punitive damage awards in cases involving "aggravating circumstances in order to penalize, punish, or deter a defendant." O.C.G.A. § 51-12-5.1(a) (2000).

presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 1521 (2003).

The United States "Constitution imposes a substantive limit on the size of punitive damages awards[,]" however. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420, 114 S. Ct. 2331, 2335 (1994). "A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment." *Id.* at 434-35, 114 S. Ct. at 2342. We are therefore charged with reviewing the jury's award to determine whether it "can fairly be categorized as 'grossly excessive' in relation to" the state's legitimate interests, *Gore*, 517 U.S. at 568, 116 S. Ct. at 1595, and to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426, 123 S. Ct. at 1524.

When determining whether a punitive damages award is unconstitutionally excessive, we are guided by "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[18] *Id.* at 418, 123 S. Ct. at 1520. We do not view these "guideposts" as an "analytical straitjacket," *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 81 (1st Cir. 2001),

[18] Defendants do not challenge the amount of the punitive damages award as excessive under Georgia law other than as already discussed.

and we maintain as our overarching aim eliminating the risk that a defendant is punished arbitrarily or without fair notice of the possible consequences of its actions. *Gore*, 517 U.S. at 574, 116 S. Ct. at 1598 (noting that due process requires a person to have "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose").

1. *Reprehensibility*

Of the three guideposts, the reprehensibility of a defendant's conduct is the most relevant; punitive "damages imposed on a defendant should reflect 'the enormity of his offense.'" *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. In evaluating reprehensibility, we consider

> whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.

Campbell, 538 U.S. at 419, 123 S. Ct. at 1521 (citations omitted).

The reprehensibility determination "must begin with the identification of the state's interest and an assessment of the strength of that interest," which are questions of law. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir. 1999). We assume from the parties' arguments that

the relevant interest served in this case is Georgia's "strong interest in deterring environmental pollution." *Id.* at 1335.[19]

We note that the district court found that the evidence had "established a pattern of intentional misconduct . . . leading to repeated damage to Plaintiffs' properties." The district court also described Continental's approach to dealing with the public and the property owners as "less than honest."

In addition, the district court referred to evidence regarding the potential health hazards associated with inhalation or ingestion of carbon black, including a finding documented in Continental's Material Safety Data Sheet that carbon black is a possible cause of cancer in humans. The district court, therefore, did not clearly err when concluding that Continental's actions reflected an indifference to or a reckless disregard of the health or safety of others.[20]

We conclude that the district court's findings are supported by the record, and we agree with the district court that these facts support a finding that Continental's actions were "so reprehensible as to warrant the imposition of further sanctions." *Campbell*, 538 U.S. at 419, 123 S. Ct. at 1521. We go further, however, to note briefly those aspects of the facts in this case that justify the punitive damages actually awarded.

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[19] Although *Johansen* concerned water pollution, our rationale (i.e. Georgia's legislative enactments addressing pollution) applies equally in this case. *See* O.C.G.A. § 12-9-23 (2006) (establishing civil penalty of up to $25,000 per day for violations of the Georgia Air Quality Act, §§ 12-9-1 to 12-9-25).

[20] The evidence does not conclusively establish that carbon black is carcinogenic in humans. Continental suggests that lack of certainty renders its conduct less reprehensible. On the contrary, the risk of releasing a possible carcinogen into the environment, even when, or perhaps especially when, the possibility is not well defined, counsels for the adoption of extraordinary precautions and justifies extraordinary penalties when available precautions are consciously ignored.

With respect to the pattern and duration of Continental's intentional misconduct, the events at issue spanned more than five years, and Continental continued its course of action and inaction undeterred by both the prospect and reality of litigation. In addition, the harm inflicted cannot adequately be characterized as solely economic. Continental's actions resulted in the destruction of a once successful business and interfered with the use and enjoyment of municipal property. Moreover, according to the evidence, the City, which is accountable to all of its citizens, was compelled to approve special funding for and devote extraordinary labor resources to the cleaning of its damaged properties.

The evidence also demonstrated Continental's willingness to elude accountability. An employee of the Alabama Department of Environmental Management ("ADEM") apparently offered the Phenix City plant management advanced warning of impending, supposedly surprise, government inspections. Furthermore, the properties at issue are located in a state whose government could offer the property owners no regulatory protection. Indeed, Nicks testified that when representatives from the Georgia Department of Natural Resources surprised him with an unannounced visit to inspect the plant, he denied them entry.

Finally, we note that Continental's actions likely harmed a great number of people and businesses who are not parties to this litigation. While punitive damages may not be awarded to punish for harm inflicted on nonparties, we may consider the risk of harm to others as part of the reprehensibility analysis. *Philip Morris U.S.A. v. Williams*, 549 U.S. ___, 127 S. Ct. 1057, 1063-64 (2007).

We conclude, therefore, that Continental's actions and inaction were exceedingly reprehensible.[21] We decline Con-

[21] The fact that Alabama permitted CCC to release carbon black into the atmosphere is of no consequence and, in any case, does not negate the reprehensibility of Continental's actions. As Conti-

tinental's invitation to compare its actions with those of other defendants in dissimilar contexts and base our conclusion on the facts before us in this case alone. *Cf. TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 458, 113 S. Ct. 2711, 2720 (1993) (plurality) ("[W]hile we do not rule out *the possibility* that the fact that an award is significantly larger than those in *similar circumstances might*, in a given case, be one of many relevant considerations, we are not prepared to enshrine petitioner's comparative approach in a 'test' for assessing the constitutionality of punitive damages awards." (emphasis added)). A substantial penalty beyond the compensatory damages awarded was fully warranted. *See In re Exxon Valdez*, 472 F.3d 600, 625 (9th Cir. 2006) (reducing punitive damages award to $2.5 billion despite actual damages, including those paid to settle numerous claims, of $504.1 million); *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (upholding a punitive damages award of $13.3 million imposed on the board of trustees for a public library system and the board's director despite a compensatory damages award exceeding $3 million when the defendants' wrongful actions were intentional and evidenced efforts to cover up their wrongful intent); *cf. Johansen*, 170 F.3d at 1339 (upholding a punitive damages award of $4.35 million, which represented nearly 100 times the compensatory award, in a pollution case involving conduct deemed "not very reprehensible, with no aggravating factors present"), *cert. denied sub nom. Combustion Eng'g, Inc. v. McGill*, 528 U.S. 931, 120 S. Ct. 329 (1999).

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nental acknowledged at trial, its permit did not empower the company to damage property. Further, the Supreme Court has noted that "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious." *Campbell*, 538 U.S. at 422, 123 S. Ct. at 1522.

2. The Difference Between Actual or Likely Damages and the Punitive Damages Award

We next ask "'whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred.'" *TXO Prod. Corp.*, 509 U.S. at 460, 113 S. Ct. at 2721 (quoting with added emphasis *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 111 S. Ct. 1032, 1045 (1991)), *quoted in Gore*, 517 U.S. at 581, 116 S. Ct. at 1602. This determination has not yet been reduced to a "simple mathematical formula." *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602. Instead, the Supreme Court has endorsed the view that "ratios greater than those [the Court has] previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524 (quoting *Gore*, 517 U.S. at 582, 116 S. Ct. at 1602). Conversely, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based on the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

Continental contends that a punitive to compensatory damage ratio of 9:1 is unconstitutional in light of the substantial compensatory award and the Supreme Court's relevant directives. We need not address this question directly, however, because the relevant ratio is actually 5:1.

In Georgia, awards of attorney fees in tort cases involving bad faith are compensatory in nature. *See* O.C.G.A. § 13-6-11 (2006 Supp.);[22] *City of Warner Robins v. Holt*, 470

[22] When first adopted, the statute referred specifically to "bad faith in making [a] contract" and was codified in the section of the Georgia Code governing contracts. O.C.G.A. § 13-6-11 (1982). In 1984, the statute was amended to remove the language limiting its

S.E.2d 238, 240 (Ga. Ct. App. 1996) (holding that the purpose of an award of attorney fees and litigation expenses "is to compensate an injured party, in order that such parties are not further injured by the cost incurred as a result of the necessity of seeking legal redress for their legitimate grievances"); *Ross v. Hagler*, 433 S.E.2d 124, 127 (Ga. Ct. App. 1993) (noting that an award of attorney fees under section 13-6-11 is not punitive in nature); *Privitera v. Addison*, 378 S.E.2d 312, 317 (Ga. Ct. App. 1989) (describing fees awardable under section 13-6-11 as an element of "actual damages"). The attorney fees in this case were premised on a finding of bad faith pursuant to section 13-6-11. Consequently, we include the attorney fees as part of the measure of actual damages for the necessary comparison. *See Willow Inn, Inc. v. Pub. Svc. Mut. Ins. Co.*, 399 F.3d 224, 234-37 (3d Cir. 2005) (relying on state law to define the character of an attorney fee award and including the fee award in its calculation of actual damages).[23]

The question we must ask then is whether a punitive damages award of $17.5 million is proportionally related to the compensatory damage award of approximately $3.2 million. Under the circumstances of this case, we think it is.

We have not overlooked the Supreme Court's guidance, described by the Court as "not binding" but "instructive," *Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524, that ratios in excess of 1:1 and/or 4:1 may only rarely satisfy due process

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applicability to contract cases, and it has since been applied in cases involving tort claims. *See, e.g., St. Paul Fire & Marine Ins. Co. v. Clark*, 566 S.E.2d 2, 11 (Ga. Ct. App. 2002).

[23] The district court's reliance on the 9:1 ratio constitutes a legal determination involving the definition of compensatory damages, which we review *de novo*. Thus, we do not mean to suggest that the district court's calculations were factually clearly erroneous.

requirements.[24] The facts before us, we believe, compel application of what the Court may someday unequivocally endorse as the rare exception. *See In re Exxon Valdez*, 472 F.3d at 624 (concluding that a ratio of approximately 5:1 ($2.5 billion:$504 million) was constitutionally sound despite finding that the conduct at issue was neither intentional nor malicious and that previous efforts to correct the damage mitigated reprehensibility); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005) (developing, based on the relevant Supreme Court precedents, a general guideline allowing for a single-digit ratio greater than 4:1 in cases involving "significant economic damages and more egregious behavior"), *cert. denied*, 126 S. Ct. 1912 (2006). As we have already concluded, the evidence supporting the district court's finding of reprehensibility alone justifies the punitive damages award.[25]

3. *Comparable Civil and Criminal Penalties for Similar Conduct*

Lastly, we must consider "the available civil and criminal penalties the state provides for" Continental's misconduct

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[24] *See Campbell*, 538 U.S. at 425, 123 S. Ct. at 1524 (endorsing a 1:1 ratio as the general rule when substantial compensatory damages have been awarded and noting the Court's historical view that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety"). *But see TXO Prod. Corp.*, 509 U.S. at 462, 113 S. Ct. at 2722 (upholding a punitive damages award in excess of 526 times the actual damages awarded); *Haslip*, 499 U.S. at 23, 111 S. Ct. at 1046 (upholding a punitive damages award "more than 4 times the amount of compensatory damages, . . . more than 200 times the out-of-pocket expenses of [the plaintiff], . . . and . . . much in excess of the fine that could be imposed for insurance fraud").

[25] We reach this conclusion without considering the likely harm that would have resulted had Continental been permitted to continue polluting the property owners' property. Obviously, this factor would only strengthen our conclusion.

to determine whether Continental had notice that it could be ordered to pay the amount awarded. *Johansen*, 170 F.3d at 1337. "[A] reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'" *Gore*, 517 U.S. at 583, 116 S. Ct. at 1603 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301, 109 S. Ct. 2909, 2934 (1989) (O'Connor, J., and Stevens, J., concurring in part and dissenting in part)). This factor, however, "is accorded less weight in the reasonableness analysis than the first two guideposts." *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1364 (11th Cir. 2004).

We must first decide whether to look to the law of Georgia, which has the greater interest in deterring Continental's conduct in this case, or the law of Alabama, which has regulatory authority over Continental. We assume from the parties' arguments that Alabama law is the appropriate guide.

Relying on provisions in the Alabama Environmental Management Act ("AEMA"), Continental contends that the potential penalty in Alabama could not exceed $250,000 and therefore could not provide notice of a potential civil penalty of $17.5 million. *See* Ala. Code § 22-22A-5(18)(c) (2006 Repl. Vol.). While it is true that the relevant provision of the AEMA limits "the total penalty assessed in *an* order issued" (emphasis added) by the regulating agency, the statute does not limit the number of such orders the agency may issue. *Id.* In other words, ADEM is empowered to assess a penalty of up to $25,000 per violation up to a total of $250,000 per order. *Id.* That does not mean that after issuing such an order, ADEM cannot again assess penalties against a polluter who was the subject of a $250,000 fine. To so interpret the statute would lead to absurd results and defeat the Act's stated intent "to improve the ability of the state to respond in an efficient, comprehensive and coordinated manner to environmental

problems, and thereby assure for all citizens of the state a safe, healthful and productive environment." § 22-22A-2.[26]

Conceivably, then, Alabama could fine Continental $250,000 for every ten violations. As we stated in *Johansen*, however, "[i]f a statute provides for a range of penalties depending on the severity of the violation, . . . it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute." 170 F.3d at 1337. Thus, we cannot simply presume that Alabama would have fined Continental an incalculable number of times or would have assessed the maximum amount each time. Nor are we capable of guessing as to the frequency of Continental's violations, though evidence in the record indicates that it did indeed violate conditions of its permit and thus the AEMA. *See generally* § 22-22A-5(18).

We do not find ourselves utterly without guidance, however, for "the extent of the defendant's statutory notice is related to the degree of reprehensibility of his conduct." 170 F.3d at 1337. Considering the reprehensibility of Continental's conduct, we can surmise that if Alabama citizens had found themselves the victims of Continental's malfeasance, ADEM would have vigorously enforced the relevant statutes and fined Continental closer to the maximum amount allowed, perhaps several times if necessary. Continental consequently was on notice that its actions could result in civil penalties that far exceed the per-order cap limiting ADEM's discretion, and we do not believe it implausible that vigorous enforcement would have led to an accrual of fines totaling several million dollars. We are thus satisfied that the award

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[26] We do not intend to suggest that the penalties assessable pursuant to the AEMA provide the "most relevant 'other sanction.'" *Johansen*, 170 F.3d at 1337. Continental focuses solely on the AEMA, as did the district court, apparently. The property owners offer no alternative.

was not grossly disproportionate to the penalties Continental faced for its actions. Moreover, we conclude that the punitive damages award was not unconstitutionally excessive.

V. CONCLUSION

In sum, the evidence and the relevant law supported the jury's verdict, the final judgment, and the district court's decision to deny Continental's post-trial motion. Accordingly, we affirm the district court's order and the judgment entered on the jury's verdict.

AFFIRMED.

APPENDIX B

United States District Court, M.D. Alabama,
Eastern Division.
ACTION MARINE, INC., et al., Plaintiffs,
v.
CONTINENTAL CARBON, INC., et al., Defendants.
No. 3:01-CV-994-MEF

Jan. 23, 2006

MEMORANDUM OPINION AND ORDER

FULLER, Chief J.

This cause is before the Court on the Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 248) filed on February 14, 2005. The Court has carefully considered the Brief in Support of Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 281) filed on April 20, 2005 and the Plaintiffs' Opposition to Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 290) filed on May 20, 2005. For the reasons set forth in this Memorandum Opinion and Order, the Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 248) is due to be DENIED.

BACKGROUND

On August 13, 2001, Action Marine, Inc. (hereinafter "Action Marine") a Georgia business, and its owner John Tharpe (hereinafter "Tharpe") filed suit in this Court[1] against Continental Carbon Incorporated (hereinafter "Continental

[1] Action Marine invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1332.

Carbon"), Barry Nicks[2] (hereinafter "Nicks"), Todd Miller (hereinafter "Miller"),[3] China Synthetic Rubber Corporation ("China Synthetic"), and Taiwan Cement Corporation (hereinafter "Taiwan Cement")[4] (hereinafter collectively referred to as "Defendants"). Action Marine's original complaint included the following claims: Negligence (Count I); Wanton Conduct (Count II), Breach of Duty to Warn (Count III); Fraud, Misrepresentation, and Deceit (Count IV); Nuisance (Count V); Trespass (Count VI); Common Law Strict Liability (Count VII); and Permanent Injunction (Count VIII). Although, the Complaint stated that Action Marine brought this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, this Court later denied Plaintiffs' request for class certification.

On January 22, 2002, Action Marine filed an Amended Complaint (Doc. # 28). By this amendment, Action Marine added two additional named plaintiffs: the City of Columbus, Georgia (hereinafter "City of Columbus") and Phillips Homes, Inc. (hereinafter "Phillips Homes"), a Georgia business. On February 14, 2002, Plaintiffs again amended their allegations by filing the Second Amended Complaint (Doc. # 34). The Second Amended Complaint added Owen Ditchfield (hereinafter "Ditchfield"), a citizen of Georgia as a named plaintiff to the action.

Defendants filed dispositive motions which were granted in part and denied in part. Plaintiffs abandoned some of their claims. On August 11, 2004, the trial of this cause began. Plaintiffs presented the following claims to the jury: nuisance, trespass, negligence, and wantonness. All parties

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[2] Nicks is incorrectly denominated in the Second Amended Complaint as Nix.

[3] Action Marine alleged that Nicks and Miller were employees of Continental Carbon's Phenix City plant.

[4] China Synthetic and Taiwan Cement are the parent corporations of Continental Carbon.

agreed that the substantive law of Georgia applied to this case. The presentation of evidence and witnesses lasted for ten days. During this time, the jury heard testimony from both fact witnesses and expert witnesses. Some of that testimony was conflicting and necessarily required the jury to make credibility determinations. Defendants made a motion for judgment as a matter of law at the close of the Plaintiffs' case on the seventh day of the trial. The Court granted this motion in part and denied it in part. Defendants presented evidence in opposition to Plaintiffs' claims including its own fact witnesses and expert witnesses. Defendants renewed their motion for judgment as a matter of law at the close of their case in chief. The Court denied the renewed motion for judgment as a matter of law.

The Court asked the parties to submit proposed jury instructions and proposed verdict forms. The Court conducted a charge conference where the jury instruction and verdict forms were discussed with counsel. On the ninth day of trial, the Court instructed the jury and they began their deliberations. The jury submitted several questions to the Court during their deliberations and the Court addressed all such questions after conferring with counsel.

On the tenth day of trial, the jury returned a verdict for Plaintiffs. In returning this verdict in favor of the Plaintiffs, the jury completed a nine page Verdict Form (Doc. # 216) and answered twenty special interrogatories. The jury awarded $1.2 million dollars in compensatory damages to Action Marine; $100,000 in compensatory damages to John Tharpe; $45,000 to Owen Ditchfield; and $570,000 to the City of Columbus, Georgia. After the verdict, Defendants orally renewed their motion for judgment as a matter of law. The Court denied the renewed motion for judgment as a matter of law.

After the return of the verdict on liability and compensatory damages, additional testimony was presented in support of Plaintiffs' claims for punitive damages and attorneys' fees.

The Court provided the jury with further jury instructions and a verdict form addressing the punitive damages and attorneys' fees issues. The jury returned a verdict in Plaintiffs' favor. In returning this supplemental verdict on attorneys' fees and punitive damages, the jury competed [sic] a Supplemental Verdict Form (Doc. # 217) which required them to answer three specific interrogatories. The jury awarded Plaintiffs $17,500,000 in punitive damages and $1,294,000 in attorneys' fees[5] and specifically found that Defendants acted or failed to act with a specific intent to harm the Plaintiffs.

At the conclusion of the jury trial in this case, there still remained pending before this Court Plaintiffs' claims for injunctive relief. This Court required further submissions on the issue of injunctive relief. Persuaded that injunctive relief was appropriate, but concerned that prior submissions failed to provide sufficient information to allow the Court to shape the injunctive relief, the Court required additional submissions on the injunctive relief. The parties negotiated a settlement of the injunctive claims and submitted a proposed order setting forth the injunctive relief to which they had agreed. In early July of 2005, this Court entered an injunction.

In addition to the post judgment motions now pending before this Court [sic]. The parties have been litigating some post judgment claims regarding sanctions against Defendants for conduct during pretrial discovery which was not discovered until after the conclusion of the trial. This Memorandum Opinion and Order will not touch on those sanctions because that matter has been referred to Magistrate Judge McPherson who, consistent with the practice of this district, is more intimately familiar with the course of discovery in this litigation and the patterns of the parties' conduct during discovery.

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[5] Attorneys' fees were awarded pursuant to O.C.G.A. § 13-6-11, and punitive damages were awarded pursuant to O.C.G.A. § 51-12-5.1.

DISCUSSION

A. Motion for Judgment as a Matter of Law

A motion for judgment as a matter of law as to a particular issue should be granted when "there is no legally sufficient evidentiary basis for a reasonable jury to find for [the non-movant] on that issue." Fed. R. Civ. P. 50(a)(1); *Wood v. Green*, 323 F.3d 1309, 1312 (11th Cir. 2003). Thus, as the Eleventh Circuit has explained,

> [t]he jury's verdict must stand unless there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. It is the jury's task–not ours–to weigh conflicting evidence and inferences, and determine the credibility of the witnesses. If reasonable jurors could reach different results, we must not second guess the jury or substitute our judgment for its judgment.

Shannon v. Bellsouth Telecomms., Inc., 292 F.3d 712, 715 (11th Cir. 2002) (internal quotations and citations omitted.)

Defendants raise several arguments in support for their motion for judgment as a matter of law relating to the sufficiency of the evidence on various issues. This Court is not convinced by any of these arguments. The jury attentively listened to the witnesses and had an ample opportunity to review the exhibits during their deliberations and when they were published at trial. Moreover, the jury was carefully instructed on all of the applicable law and provided with a very specific verdict form. This Court is persuaded that there exists a legally sufficient evidentiary basis in support of every aspect of the jury's verdict challenged by Defendants in their current motion for judgment as a matter of law. Accordingly, to the extent that Defendants argue that they are entitled to judgment as a matter of law, their motion (Doc. # 248) is due to be DENIED.

B. Motion for a New Trial

Pursuant to Federal Rule of Civil Procedure 59(a)(1), a motion for a new trial may be granted as to all or any of the parties and on all or part of the issues tried to a jury "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." In support of their alternative motion for a new trial, Defendants contend that the verdict rendered by the jury after this ten day trial is against the great weight of the evidence. The Court does not agree. To the extent that Defendants have argued that they are entitled to a new trial because any aspect of the jury's findings was against the great weight of the evidence or unsupported by the evidence, their motion for a new trial on those bases are due to be DENIED.

Defendants contend that they are entitled to a new trial due to purported errors within the jury charges, the verdict form, rulings on the admissibility of evidence, and a ruling requiring a witness to be produced at trial. (Doc. # 248 at 22-25) The Court has considered each and every one of these grounds and find them to be wholly without merit. Accordingly the motion for new trial is due to be DENIED to the extent that it is predicated on these grounds.

Defendants contend that the compensatory damages in this case are not supported by evidence. Defendants also contend that damages awarded to Action Marine are legally improper. (Doc. # 248 at 27). On these contention, they seek either a new trial or remittitur. The Court does not agree that the compensatory damage awards are legally flawed as Defendants contend. Accordingly, the alternative motions for new trial or remittitur on such arguments are due to be DENIED.

Defendants argue that the size of the punitive damage award and the "inflammatory rhetoric of Plaintiffs' counsel" compel the conclusion that the verdict in the second phase of the trial was the produce [sic] of passion and prejudice.

Based on this argument Defendants seek a new trial on punitive damages. The Court is not persuaded that Defendants are entitled to a new trial based on this argument. The punitive damage award is not grossly disproportionate to the compensatory damages award. Moreover, the Court does not agree with the Defendants' characterization of Plaintiffs' counsels' rhetoric in this case. The motion for a new trial on punitive damages is due to be DENIED.

C. Motions Relating to Punitive Damage Awards

Defendants contend that the punitive damages awarded by the jury in this case are improper and excessive. They ask this Court either to grant judgment as a matter of law on punitive damages, or to order a new trial on punitive liability, or to remit the punitive damages awarded. Defendants argue that their conduct does not satisfy the standard for the award of punitive damages under Georgia law, that the award should be reduced pursuant to § 51-12-5.1(g) of the Georgia Code, and that the punitive damages awarded were excessive under both Georgia law and the United States Constitution. The Court will address each of these arguments in turn.

1. Georgia's Standard for the Imposition of Punitive Damages

Section 51-12-5.1 of the Georgia Code controls punitive damages in tort actions under Georgia law. Punitive damages under this statute are intended solely to punish, penalize, or deter a defendant. Pursuant to O.C.G.A. § 51-12-5.1, punitive damages may only be awarded in tort actions in which it is proven by clear and convincing evidence that the defendant's conduct showed willful misconduct, malice, fraud, wantonness, oppression, or an entire want of care which would raise the presumption of conscious indifference to consequences. Defendants contend that they are entitled to judgment as a matter of law or a new trial on punitive liability because the standard for the imposition of punitive damages was not met in this case. The Court disagrees. The jury was correctly in-

structed on the applicable law and heard sufficient evidence on which to base the award of punitive damages under Georgia law. Accordingly, Defendants are not entitled to judgment as a matter of law in Defendants' favor on Plaintiffs' claims for punitive damages. Moreover, Defendants are not entitled to a new trial because the Court is not persuaded that the jury's finding of punitive liability is against the weight of the evidence. Defendants' motions are due to be DENIED to the extent that they are based on these grounds.

2. Georgia Code § 51-12-5.1(g)

Under Georgia law, the maximum amount of money that a jury may award to any one plaintiff as punitive damages is limited to $250,000. *See* O.C.G.A. § 51-12-5.1(f) & (g). Georgia law does provide that punitive damages awards may exceed this cap if "it is found that the defendant acted, or failed to act, with the specific intent to cause harm." *Id.* If a jury finds that a defendant acted or failed to act with specific intent to cause harm, "there shall be no limitation regarding the amount which may be awarded as punitive damages...." O.C.G.A. § 51-12-5.1(f). The Court finds that the jury in this case was properly instructed on the imposition of punitive damages and that they answered a specific interrogatory which affirming that they had found the specific intent to cause harm which under Georgia law presents a basis for sustaining a damage award in excess of the statutory cap. The Court does not agree that Plaintiffs failed to adduce sufficient evidence that Defendants acted with specific intent to harm Plaintiffs. The Court is not persuaded that the jury's factual determination of specific intent should be disturbed. Accordingly, the motion is due to be DENIED to the extent that Defendants contend that the punitive damage award should have been capped pursuant to Georgia law.

3. Analysis of Amount of Punitive Damages Under Georgia Law

Defendants contend that the punitive damage award is excessive and must be either vacated or remitted under Georgia law.

> In determining the reasonableness of an award of punitive damages [under Georgia law], courts should consider whether: (1) the misconduct caused personal injury or merely damage to property; (2) the actor's misconduct was active or passive; and (3) a rational relationship exists between the misconduct and the amount of the award.

Lightning v. Roadway Express, Inc., 60 F.3d 1551, 1559 (11th Cir. 1995). Defendants' misconduct caused damage to property and the risk of personal injury, albeit a risk not realized by these Plaintiffs. Their misconduct was active. In this Court's view a rational relationship exists between the misconduct and the amount of the award. Having evaluated the reasonableness of the award in this case by evaluating the requisite factors, the Court is satisfied that the award is not unreasonable or excessive. Accordingly, the motion is due to be DENIED to the extent that it is predicated on the contention that the punitive damage award is excessive under Georgia law.

4. Constitutional Principles of Due Process

Having addressed the issues relating to the appropriateness of the amount of punitive damages awarded under Georgia law, the Court will now consider whether the award satisfies the constitutional principles of due process. As an initial matter, the Court finds that both the statutes of Alabama, where Defendants' plant is located, and Georgia, where Defendants' emissions settled, express a strong interest in deterring environmental pollution. This interest supports a substantial punitive damage award.

"In our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (internal citation omitted). Whereas "[c]ompensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct . . . punitive damages serve a broader function; they are aimed at deterrence and retribution." *Id.* (internal citations and quotations omitted). For this reason, there are procedural and substantive constitutional limitations on the imposition of punitive damages; namely, the "Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *Id.* at 416. *See also BMW v. N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Only when an award can fairly be categorized as 'grossly excessive' in relation to [the state's] interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.").

In reviewing punitive damages awards to ensure that they are based upon an "application of law rather than a decisionmaker's caprice," the United State Supreme Court instructs courts to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. In *State Farm*, the Supreme Court addressed each guidepost in some detail and concluded that the jury's punitive award of $145 million on a $1 million compensatory judgment "was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."

The Supreme Court has described the first guidepost–the degree of reprehensibility of the defendant's conduct–to be the "'most important indicium of the reasonableness of a punitive damages award.'" *Id.* at 419 (quoting *Gore*, 517 U.S. at 575). In *State Farm*, the Supreme Court explained:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.

Id. (citations omitted). Unmistakably, some types of conduct are more reprehensible than others and therefore more deserving of a substantial punitive damages award. *Gore*, 517 U.S. at 575. For example, negligent conduct is less reprehensible than intentional misconduct, and infliction of economic harm is less reprehensible than infliction of physical harm. *Id.* at 576. Admittedly, the harm inflicted in this case was economic rather than physical. On the other hand, a pattern of misconduct is more reprehensible than individual acts of wrongdoing. *Id.* at 576-77. The evidence before the jury established a pattern of intentional misconduct on the part of

the defendants leading to repeated damage to Plaintiffs' property. This misconduct included bolstering profits rather than remedying known defects with production systems which caused known emissions of carbon black and a less than honest approach to their dealings with Plaintiffs and others damaged by Defendants' conduct. Additionally, the tortious conduct by Defendants evinced an indifference to or a reckless disregard of the health or safety of others given the nature of the materials being put into the environment. While none of Plaintiffs have a claim in this case for physical injury, the Court cannot ignore that emissions of carbon black can pose serious health risks. After considering all of the relevant factors, the Court find that Defendants' culpability is so reprehensible as to warrant the imposition of further sanctions, after having paid compensatory damages, to achieve just punishment and adequate deterrence.

Turning to the second guidepost, the Supreme Court has been reluctant to "identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 425. Although declining to impose a bright-line ratio which a punitive damages award cannot exceed, the Court has recognized that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* Citing a long history of providing sanctions of double, treble, or quadruple damages to deter and punish, the Court stated in *State Farm*:

> While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios of 500 to 1 [as in *Gore*], or in this case, of 145 to 1.
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not sur-

> pass, ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages. The converse is also true, however. Where compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

Id. (quotation marks and citations omitted). "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.* at 426. In this Court's view, the punitive damage award is rationally based on the evidence presented to the jury at trial and intended to punish Defendants in a reasonable and proportionate way. The Court further finds that in light of the evidence the ratio of punitive damages to compensatory damages comports with due process.[6]

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[6] This case involves a single digit multiplier. The ratio of punitive damages to compensatory damages is 9.14:1. The Court notes that in its view the facts of this case could have supported an even higher multiplier. In *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320 (11th Cir.), *cert. denied*, 528 U.S. 931 (1999), the Eleventh Circuit Court of Appeals upheld a punitive award of $4.35 million dollars, which was around 100 times the amount of actual damages awarded by the jury, because this amount was "justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy." 170 F.3d at 1339. The Eleventh Circuit noted that the defendant in *Johansen* was "a large and extremely wealthy international corporation" and that sometimes a "bigger award is needed to attract the . . . attention of a large corporation" in order to promote deterrence effectively. *Id.* at 1338 (internal quotation marks omitted). Thus, a strong state interest in

Under the third guidepost, the Court analyzes the disparity between the punitive damages awarded by the jury in this case and the civil penalties authorized or imposed in comparable cases. "Whether a defendant had constitutionally adequate notice that his conduct might result in a particular damage award depends in large part upon the available civil and criminal penalties the state provides for such conduct." *See, e.g., Johansen*, 170 F.3d at 1337. There may be a lack of adequate notice to the defendant "if the difference between the civil or criminal penalties that were or could have been imposed and the punitive damage award is too great." *Id.* Of course, this Court is mindful that this third guidepost is "accorded less weight in the reasonableness analysis than the first two guideposts." *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1364 (11th Cir. 2004).

Defendants ask the Court to compare the $17.5 million punitive damage award to the civil penalties that could have been imposed by the Alabama Department of Environmental Management ("ADEM") for air pollution pursuant to Alabama Code §§ 22-22A-4 and 22A-5.[7] According to Defendants, those statutes impose a $250,000 cap on the "total penalty [that is] assessed in an order issued by the department." Ala. Code § 22A-5(18)c. Defendants argue that given they have not received a civil penalty from ADEM, the disparity between the punitive damage award and the possible fine by ADEM confirms that they lacked fair notice, as due process requires, that they could be subject to a penalty such as the punitive damages awarded in this case.

In *Johansen*, a case involving nuisance and trespass claims by landowners against a mining company for acidic

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deterrence of a particular wrongful act may justify ratios higher than might otherwise be acceptable. *Id.*

[7] Defendants did not receive fines from ADEM. There was testimony and evidence presented at trial that Defendants were "tipped off" by ADEM prior to plant inspections.

water that had escaped from the mining operation, the Eleventh Circuit Court of Appeals approved a punitive damage award that was 400 times greater than the fine the mining company had received and 100 times greater than the maximum penalty that could have been imposed. 170 F.3d at 1337-39. In light of this precedent, the Court is satisfied that the possible civil penalty under Alabama law of $250,000 provided Defendants with adequate notice that their conduct could result in a substantial penalty for pollution. Indeed, it would seem that even if a much larger punitive damage award had been returned by the jury, this factor would have supported finding that it did not offend due process.

In sum, the Court finds that the facts of this case clearly support a very significant award of punitive damages. The Court cannot find on the record before it that the punitive damages award in this case is unconstitutionally excessive. This Court does not agree with Defendants' contention that the punitive damages award offends due process. Accordingly to the extent that Defendants' motion seeks a new trial, remittitur, or any other reduction of the punitive damages award in this case, their motion is due to be DENIED.

CONCLUSION

The Court has carefully considered the evidence in this case and the arguments in support of and in opposition to the instant motion pursuant to the applicable legal standards. It is hereby ORDERED that Defendants' Motion for Judgment as a Matter of Law or, in the Alternative, Motion for New Trial or, in the Alternative, Motion for Remittitur (Doc. # 248) is DENIED.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

United States District Court, M.D. Alabama,
Eastern Division.
ACTION MARINE, INC., et al., Plaintiffs,
v.
CONTINENTAL CARBON, INC., et al., Defendants.
No. 3:01-CV-994-MEF

INJUNCTIVE RELIEF ORDER

Plaintiffs in this suit have sought both damages, which were awarded to them by the jury on August 25, 2004, and permanent injunctive relief. After the jury returned its verdict for the plaintiffs, the Court received additional evidence and briefs on the issue of permanent injunctive relief. Following these additional submissions, the Court heard the oral arguments of the parties.

Based on the record before it, the Court found that the plaintiffs had established that a permanent injunction was warranted. The Court then reopened discovery and expert identification in the case on the limited issues relating to the crafting of a permanent injunction which would be adequately tailored to the legal violations adjudged in this case. The Court further directed that it would be necessary for the parties to make additional submissions on the issue of specific injunctive relief after this discovery was completed and that the Court would, if necessary, conduct further hearings after receiving the evidence and arguments of the parties so that it could draft an injunction specific in its terms and reasonably descriptive in its details as required by Federal Rules of Civil Procedure 65. The Court also directed the parties to attempt to settle the issue of the scope of injunctive relief.

The Court has been advised that the parties have reached an agreement on the specific terms of injunctive relief and that the parties have acknowledged their willingness to be bound by the foregoing provisions of this permanent injunctive relief Order (this "Order").

WHEREFORE, IT IS HEREBY ORDERED, that the defendants shall comply with the following requirements and terms of permanent injunctive relief in this cause:

1. Jurisdiction

Solely for the purposes of this Order, the parties have agreed to waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this judicial district. The parties have further agreed that they shall not challenge the terms of this Order or any other injunctive relief order entered to date or contest the Court's jurisdiction to enter and enforce said orders.

2. Parties Bound

This Order shall be binding upon the parties and their successors and assigns. Defendants have assured the Court that there are no present or currently anticipated financial limitations which would prevent them from meeting their obligations under this Order. This Order relates exclusively to CCC's[1] manufacturing facility located in Phenix City, Alabama and imposes no obligations whatsoever on any other facility controlled by Defendants

3. Replacement of the Unit 1 Main Bag Filter System

The ten compartments of the Main Bag Filter shall be demolished and replaced with six custom designed 316L stainless steel Pulse Jet technology bag filter compartments to be fabricated by Davco Fab, Incorporated to Defendants' specifications.

The new compartments will be installed two at a time, in three phases. In addition to the replacement of the compartments, CCC shall replace the existing equipment of the Main Bag Filter System with the following: stainless steel cage and membrane filter bags or filter bags of a similar or superior quality, new insulation on all compartments, new rotary air-

[1] Continental Carbon Company, Inc. is referred to throughout this Order as "CCC."

locks and stainless steel pneumatic piping, new inlet and outlet piping, and new on site foundation, structure, platform, instrumentation and electrical mechanisms. Defendants have represented to the Court that Phase I of this replacement has been completed as of the date of this Order. Phase II shall be completed no later than September 30, 2005. Phase III shall be completed on or before July 31, 2006.

4. Repair of the Unit 1 Exhaust Bag Filter System

Defendants shall conduct a daily visible emission inspection to ensure that it is in proper working order, to determine compliance with the ADEM operating permit in accordance with EPA procedures and shall maintain a log of these activities which will be available for review by Plaintiffs. If at any time the Unit 1 Exhaust Bag Filter System is found to have a failure, the compartment or compartments shall be shutdown and not restarted until the repairs have been completed and they are functioning properly. In addition, Defendants shall agree to complete the following by no later than June 30, 2006: (i) replace all applicable cages with stainless steel cages in pulse jet compartments and replace the filter bags in each compartment of the Unit 1 Exhaust Bag Filter System with new membrane filter bags or filter bags of a similar or superior quality for that application, (ii) repair and restore insulation on the exterior of the Unit 1 Exhaust Bag Filter System in "as new" condition, and (iii) replace all Unit 1 Exhaust Bag Filter System rotary airlocks.

5. Continuous Video Monitoring

Defendants shall install and continuously operate video surveillance cameras at their Phenix City plant, trained on the following potential emission point sources:

a. Unit 1 main bag filter stack and one side of the bag filter housing;

b. Unit 1 exhaust bag filter stack and one side of the bag filter housing;

c. Unit 1 clean up bag filter stack and one side of the bag filter housing;

d. Unit 2 main bag filter stack and one side of the bag filter housing;

e. Unit 2 exhaust bag filter stack and one side of the bag filter housing;

f. Unit 2 clean up bag filter stack and one side of the bag filter housing;

g. The thermal oxidizer stack; and

h. Clean up bag filter housing in trans-loading area.

In addition, the defendants shall install at least two (2) additional video surveillance cameras at the Phenix City plant at the southeast and northeast corners at the perimeter of the plant facility, covering the plant production units and thermal oxidizer. All cameras at the plant shall operate 24 hours a day, seven days a week, 365-days a year during normal operations. Sufficient lighting shall be installed to permit adequate video images, weather permitting, of each specific location identified in sections a. through h. above during each hour of every shift (24 hours a day) during normal operations. Video or digital media storage of the images generated by these cameras shall be maintained by the defendants for three months. Copies of videos shall be furnished to the plaintiffs upon their written request. The continuous video monitoring system shall be fully functional 90 days from entry of this Order.

6. Air Monitoring

Defendants shall install two fine particulate matter (PM2.5) monitors on the boundaries of the plant property in a direction southeast of the plant and northeast of the plant. The monitors shall be positioned at a height of no less than six (6) feet and no more than ten (10) feet. The monitors shall be positioned in an area where no natural or man-made obstructions exist between the plant's potential emission point sources and the air monitoring equipment. Twenty-four hour

air monitor samples shall be collected everyday and logged and stored properly for a period of seven (7) days from collection. Samples older than seven (7) days may be discarded. Defendants shall bear the costs associated with these sample collection procedures.

Air monitoring samples shall be made available to Plaintiffs for testing or analysis whenever counsel for Plaintiffs provides counsel for Defendants with a written request for same within six (6) days of the sample collection date. All costs associated with the analysis of any sample by Plaintiffs shall be borne by Plaintiffs. Defendants will bear the expense of any sample analysis they choose to perform. A copy of any laboratory report generated by either party as a result of said analyses shall be furnished to the opposing party.

7. Progress Reports

CCC shall file with the Court progress reports on July 31, 2005, and July 31, 2006, reporting on compliance with the terms of this Order. Plaintiffs (and any experts employed by Plaintiffs) will be authorized to inspect, review, photograph and/or videotape any equipment changes, improvements or repairs made pursuant to Paragraphs 3 and 4 herein under this Order within 14 days following the submission of the aforementioned progress reports by the defendants. Plaintiffs and/or their experts will be given complete access to the plant facilities (and subject equipment) and invoices, plans, schematics, diagrams, photos, and engineering studies/reports that relate to the equipment changes, improvements or repairs made pursuant to paragraphs 3 and 4 of this Order upon receipt of a written request by counsel within 14 calendar days following the submission of a progress report by Defendants. Within 14 calendar days following Plaintiffs' inspection and receipt of documents, Plaintiffs may file with the Court any objections, comments or assessments they may have on the progress reports submitted by Defendants under this Order. Defendants shall have the right to file a response to any filing

by Plaintiffs in connection with a progress report within 14 calendar days of Plaintiffs' filing.

8. Reimbursement of Attorneys' Fees and Costs Incurred by Plaintiffs in the Pursuit of Injunctive Relief

Defendants have agreed to pay and plaintiffs have agreed to accept the sum of $500,000.00 in full satisfaction of its claim for attorneys' fees and costs incurred in the pursuit of this injunctive relief since the date of the jury's verdict in this cause on August 25, 2004. The parties agree that the payment of this sum is not intended to satisfy any aspect of the jury verdict. The parties further agree that the payment of this sum does not constitute a waiver of Defendants' right to appeal the jury's award of attorneys' fees and costs in this matter.

By consenting to this Order, Defendants do not waive their right to appeal any other issue in this case except the injunctive relief expressly provided in this Order and the Court's jurisdiction and authority to enforce said Order. In particular, Defendants do not waive their right to appeal any issue pertaining to the final judgment as to claims submitted to the jury entered January 31, 2005, nor do they waive the right to appeal any issue respecting the jury's liability, damages, or attorney's fees awards in this or any other case. This Order in no way precludes an appeal of these issues, nor does it constitute an admission that Defendants are liable to Plaintiffs on the claims submitted to the jury, that Plaintiffs are entitled to recover damages, that the amount of damages awarded in this case was proper, or that Plaintiffs are entitled to recover the attorneys' fees awarded by the jury.

This Order shall expire, and the parties shall have no further obligations hereunder, on January 1, 2007, unless Plaintiffs petition for, and the Court grants, an extension of this Order. Defendants may oppose any such petition.

The parties have expressly agreed that the Court shall continue to have jurisdiction over this matter in order to enforce, oversee and ensure the parties' full compliance with and, implementation of, the terms of this Order until the Order expires.

If circumstances arise such that Plaintiffs believe that, after the date of this Order, there have been new depositions of carbon black on their property and that Defendants are responsible for the depositions, Plaintiffs shall, prior to the filing of any lawsuit, notify Defendants of the alleged depositions of carbon black. Upon receipt of such notification, the parties shall have thirty (30) days to meet and confer to see if a mutually agreeable resolution of the issues can be reached. This meet and confer obligation shall not, in any way, prejudice the rights of any of the parties with respect to the pursuit or defense of any claims based upon any alleged future deposition of carbon black.

DONE this the 5th day of July, 2005.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-11311-DD

May 18, 2007

ACTION MARINE, INC,
JOHN THARPE, et al.,

Plaintiffs-Appellees

versus

CONTINENTAL CARBON INCORPORATED,
CHINA SYNTHETIC RUBBER CORPORATION,

Defendants-Appellants

Before: DUBINA and WILSON, Circuit Judges, and CORRIGAN,* District Judge.

PER CURIAM:

The Petition for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

*Honorable Timothy J. Corrigan, United States District Judge for the Middle District of Florida, sitting by designation.

APPENDIX E

United States District Court, M.D. Alabama,
Eastern Division.
ACTION MARINE, INC., et al., Plaintiffs,
v.
CONTINENTAL CARBON, INC., et al., Defendants.
No. 3:01-CV-994-MEF

FINAL JUDGMENT AS TO CLAIMS SUBMITTED TO JURY

Pursuant to Federal Rules of Civil Procedure 54(b) and 58 and in accordance with the prior proceedings, opinions, and orders of the Court, it is the ORDER, JUDGMENT, and DECREE of the Court that:

(1) Consistent with the verdict of the Jury on August 25, 2004, as set forth in the Verdict Form (Doc. # 216) and the Supplemental Verdict Form (Doc. # 217), judgment is entered in favor of Plaintiffs and against Defendants on the claims submitted to the jury.

(2) Costs are taxed in favor of Plaintiffs and against Defendants, for which execution may issue.

(3) The Clerk of the Court is DIRECTED to entry [sic] this document on the civil docket as a final judgment on those claims pursuant to Federal Rules of Civil Procedure 54(b) and 58) [sic].

DONE this the 31st day of January, 2005.

/s/ Mark E. Fuller
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX F
ADDITIONAL STATUTORY PROVISIONS

Section 13-6-11 of the Georgia Code provides: "The expenses of litigation generally shall not be allowed as a part of the damages; but * * * where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them."

Section 22-22A-5(18)(c) of the Alabama Code provides in relevant part: "Any civil penalty assessed or recovered under paragraph a. or b. of this subdivision shall not be less than $100.00 or exceed $25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the department under paragraph a. of this subdivision shall not exceed $250,000.00. Each day such violation continues shall constitute a separate violation for purposes of this subdivision. In determining the amount of any penalty, consideration shall be given to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty."

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CORRECTED COPY

(5)

NO. 07-257

IN THE

Supreme Court of the United States

CONTINENTAL CARBON CO. AND CHINA SYNTHETIC RUBBER CORP.,

Petitioners,

v.

ACTION MARINE, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should combine aspects of the comparability guidepost articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), with the reprehensibility guidepost that this Court has called the most important indicium of the validity of a punitive damages award?

2. Whether this Court should reverse its settled precedents by adopting a constitutional maximum ratio of punitive to compensatory damages of 1:1 whenever the compensatory award is deemed "substantial," regardless of the reprehensibility of defendants' misconduct, particularly when that misconduct was fraudulent and hidden and was advanced by litigation misconduct that the lower court found prejudiced the capacity to demonstrate the fullest measure of reprehensibility?

3. Whether, in applying the comparable penalties guidepost, a reviewing court must ignore state legislative judgments about the appropriate potential fines for comparably egregious misconduct?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondents Action Marine, Inc., John Tharpe, Owen Ditchfield, and the City of Columbus, Georgia ("Respondents") respectfully request that this Court deny the petition for writ of certiorari that seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF THE CASE

Petitioners have adopted a strategy of disparaging their underlying liability – liability not contested in any question presented – in order to obtain relief from punitive damages. That ploy should not work. Petitioners purvey the misguided notion that the jury and two reviewing courts held them liable despite their use of "best available pollution-control technology," despite their having "identified and remedied the causes of emissions when they occurred," and despite their having caused only "tiny amounts" of pollution deposits in all but one instance. Pet. at 3-6. That is not what the jury found and its findings are not subject to reexamination in this Court. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439 n.12 (2001); U.S. Const. amend. VII.

Contrary to the tale Petitioners spin, this is a story of companies that knew that they had inadequately guarded against harmful emissions. They denied that pollution affecting Respondents and others came from their plant, despite knowing otherwise. They chose not to remediate because remediation would lessen – not eliminate, but lessen – profits. They intentionally harmed people. They hid documents that revealed their extensive knowledge of problems and then, from the filing of this case through trial and beyond, engaged in litigation misconduct for which they were separately sanctioned.

Petitioners' portrayal of the record, which Respondents describe in Part I (reasons for denying certiorari), continues the pattern of denial and obfuscation that has characterized their original misconduct. Their unclean hands should not be washed by this Court.

REASONS FOR DENYING THE PETITION

I. Petitioners Failed to Advise this Court of the Full Depth of Their Misconduct, the Extent to Which Their Actions Were Compounded by Litigation Misconduct at Trial, or That the Documents They Failed to Produce until after Trial Would Have Supported a Larger Award

Federal courts do not lightly conclude that particular acts of misconduct fall at the extreme end of the reprehensibility scale. Judges see a broad range of misconduct, civil and criminal, that makes them more likely to be blasé rather than shocked by new instances of egregious misconduct.

Accordingly, when both the District Court and the Court of Appeals find that a defendant engaged in a "pattern of intentional misconduct . . . leading to repeated damage to Plaintiffs' properties," that the defendant responded to complaints over a five-year period with subterfuge, and that the defendant's misconduct was "undeterred by both the prospect and reality of litigation," Pet. App. at 24a-25a, those courts' determinations should be considered earnestly made, and should be credited as reflecting a troubling record. The courts' statements ought to be treated as more credible than the disparagements of losing parties, who conveniently elide the parts of the record that are at odds with the tale they seek to concoct. In fact, reading Petitioners' narrative of the record, one would be hard-pressed to understand why the courts found any

misconduct at all, let alone the "exceedingly reprehensible" actions and inactions the Eleventh Circuit concluded had taken place. Pet. App. at 25a.

The massive trial record establishes a strategy of denial, deception, and subterfuge that permeated Petitioners' treatment of the Respondents and that continued through the trial and beyond. No relief from the jury's proper verdict, the trial court's affirmation of that verdict, and the careful and searching review by the Eleventh Circuit that confirmed its propriety should lie in this Court.

Petitioners' disregard of the record begins with factual findings, specially made by the jury, and not challenged here: that "clear and convincing evidence" demonstrated that Petitioners' harmful acts "showed willful misconduct, malice, fraud, oppression" or conscious indifference to the consequences of its actions, Jury Qs 4, 9, 14, 19 (a finding necessary, under governing Georgia law, to permit liability for punitive damages, O.C.G.A. §51-12-5.1(b) (2000)); that Petitioners acted in bad faith, Jury Qs 5, 10, 15, 20 (a finding prerequisite to an award of attorney fees under Georgia law, O.C.G.A. §13-6-11 (2006 Supp.)); and that Petitioners acted with "specific intent to harm the plaintiffs." Supp. Verdict Form Q 22 (a prerequisite to liability for punitive damages greater than $250,000, made in a supplemental trial under Georgia's bifurcated system of trying punitive damages claims, O.C.G.A. §51-12-5.1(f), (g)(2000)).

Especially problematic to Petitioners, who argue about the state of the record, is that the trial court, in sanctioning them post-appeal for their contemptuous abuse of discovery, found that their bad faith "prejudiced [Respondents] in their presentation of evidence to the jury, *and on appeal.*" Sanctions Op. at *19, App. A, *infra*,

35a[1] (emphasis added). Petitioners withheld evidence germane to assessing the reprehensibility of their conduct and evidence directly related to misconduct they continue to soft-peddle. *See, e.g.*, Sanctions Op. at *5-6, App. A, *infra*, 10a-11a (information related to "knowledge of the discharge of carbon black dust on the surrounding community," the causes of the discharges, remedies for the discharges, delays in implementing remedies, and the costs involved in correcting operational and environmental problems compared to delays in making the corrections); *compare, e.g.*, Pet. at 4 ("Nevertheless, *uncontradicted evidence*[2] showed that [Petitioners] identified and remedied the causes of emissions when they occurred") (emphasis supplied). Perhaps anticipating this very scenario, the lower court, noting Petitioners' intent to gain advantage on appeal, noted that their "strategy to withhold evidence until the post-trial stages would enure to them great benefit." Sanctions Op. at *15, App. A, *infra*, 27a.

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[1] The Sanctions Opinion, *Action Marine, Inc. v. Continental Carbon, Inc.*, __ F.R.D. __, 2007 WL 2301897 (M.D. Ala. Aug. 9, 2007), is reprinted in Appendix A, *infra*, 1a.

[2] This remarkable misrepresentation of the record was contradicted by evidence that discharges often occurred at night, when they could not be visibly detected. The capacity of the bag filters designed to capture emissions and prevent their discharge was known to be inadequate and decisions were made not to spend the money that would have addressed that inadequacy. Petitioners investigated the complaints of discharge, concluded that they were valid, and Petitioner still denied that they were the cause, continuing to do business just as before. (R. 1368-70, 1692; Dkt. 268, Ex. A, pp. 5-20, 413, 425; Dkt. 268, Ex. C, pp. 19, 126-27, 169, 291-92, 369, 410-11, 414-15, 463, 628; PX 1.3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 17, 23, 43, and 172-6).

Petitioners emphasize the fact that "Several of the properties for which the City sought recovery tested negative for carbon black," and that the City "recovered damages to remediate these properties." Pet. at 5-6. Petitioners' suggestion of injustice is supported by only one thread in a strong cloth of evidence.

Respondents conducted random sampling during the life of this case. E.g., PX 104B-8, 9, 10, 11, 13, 14, 18, 19, 21, 22, 27-30, 34, 35, 42-45, 60-62, 65, 67, 69-71, 73, 74. [NOTE: These are all page numbers in 1 composite exhibit, 104B.] One sample collected at the Rigdon Park baseball field and one at Memorial Stadium did not yield positive laboratory results for carbon black (PX 104-B-21 and 68); Respondents did not collect a sample from the Whopper softball field. (R. 1447). This is the thread on which Petitioners' suggestion hangs.

But the Rigdon Park ball field lies directly between the Rigdon Park pool and playground (same property). (R. 720, 726, 1233). Both the pool and playground yielded positive samples. (PX 104-B-13, 69, 70, 71; PX 109-75). Similarly, the Memorial Stadium and Whopper softball field facilities share a parking lot with the Civic Center and Golden Park. (R. 1009-10, 1219-20, 1427,1465). Petitioners and Respondents both collected positive samples at the Civic Center and Golden Park and additional scientific evidence in the form of air-modeling data placed each facility in the fallout area. (PX 61; PX 104-B-11, 19, 65, 67; PX 144; R. 369-73, 374-75, 877-90, 928, 1353, 1373, 1785-86, 1816, 1821-22).[3] Abundant

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[3] Reviewing the laboratory reports, photographs, and data generated by Respondents' expert, Petitioners' own expert conceded at trial it was "fine work." (R. 1824-1826). While Respondents introduced expert testimony and evidence relating to air emission modeling, Petitioners offered none. (PX 144; R. 877-78, 891-92, 909).

evidence supports the findings Petitioners decry but do not challenge.

Similarly, Petitioners suggest that they "identified and remedied the causes of emissions when they occurred," Pet. at 4; "built new plant facilities" that "pretty much solved" problems, Pet. at 4; and did all this "before judgment was entered." Pet. at 13, n.4.

Although Petitioners certainly identified equipment and operational problems that were causing carbon black emissions, they did not remedy any of those problems or replace any equipment until after this case was filed. Even then, the bulk of their equipment problems were not addressed until after the jury returned its verdict and after Petitioners were confronted with the prospect of an injunction requiring the work. In delaying, corporate decisionmakers ignored the pleas of plant managers to spend the money necessary to avoid the harm that all of them knew was occurring, betting the health of the community against their corporate bottom line.[4]

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[4] Petitioners assert that "there was no evidence that the carbon black emissions posed a health risk to the community," Pet. at 5 n.3, but do not challenge the findings otherwise that are well-supported in the record. According to Petitioners' own Material Data Safety Sheets, the Occupational Safety and Health Administration (OSHA) classifies carbon black as "hazardous under OSHA regulations"; the U.S. National Institute on Occupational Safety and Health has adopted a air concentration limit for exposure to polyaromatic hydrocarbons (PAHs) in carbon blacks with specified PAH levels, "[a]s some PAHs are possible human carcinogens"; and IARC, the International Agency for Research on Cancer, has classified both carbon black and carbon black extracts as "possibly carcinogenic to humans." (PX 32-8, 32-17).

The Phenix City facility has been in operation for over twenty years. (Dkt. 175-1). The original production unit (Unit One) was constructed in 1968. (PX29). In 1998, by adding a second production unit (Unit Two), Petitioners doubled annual carbon black production capacity to 200 million pounds. (Dkt. 268, Exhibit C, p. 2) (R. 74, 224). Even before Petitioners doubled production capacity, City of Columbus officials and local residents had complained to Petitioners about carbon black pollution and damages. (PX2). Although Petitioners publicly denied the problems, and even lied to Respondent Action Marine by advising Respondent that samples taken from Respondent's property did not contain carbon black, Petitioners admitted internally that Unit One was in deplorable condition when the plant expansion began. (R. 291-292, 322). Plant manager Barry Nicks stated in an e-mail: *"Damn those who let it get in such a disgraceful state."* (R. 322; PX3) (emphasis added).

Within one year after the additional operating unit came on line Petitioners were aware that their facility was polluting the environment and damaging properties. (PX1, 2, 5, 6, 7, 8, 11, 12, 19, 22, 153; R. 258; Dkt. 268, Exhibit A, p.14; Dkt. 268, Exhibit C, p. 2 (Continental Carbon Co. (hereinafter "CCC") president, Kim Pan, admitting knowing since 1999 of bag filter defects)). In various internal documents, Petitioners exhibited knowledge that reparable manufacturing defects and deficiencies at their facility were causing harm. (PX 5; R. 188, 369, 390-91, 399-400, 412-13, 415, 425, 426, 459-60, 463, 473). Petitioners specifically acknowledged that repeated bag filter failures and over-pressurization of their production system were harming the environment and the Respondents. (Dkt. 268, Exhibit A, pp. 8-11, 14).

One undated internal Request for Expenditure ("RFE"), going from the local plant to corporate

decisionmakers, detailed the history of bag filter failures and carbon black releases:

> *Phenix City has experienced operational problems with the bag filter system since Unit 2 was commissioned in 1999.* The filter media fails . . . *causing* unnecessary unit down time, operating cost, and *carbon black release into the environment.* . . . The engineering analysis points to basic over-loading of the bag filter system (commonly referred to as: high air/cloth ratio).

(PX9) (emphases added). In this same RFE, Petitioners attributed this lawsuit to bag filter failures, admitted they were harming the environment, and evaluated civil liability in this case:

> *The frequent bag filter failure* has been a constant drain on Phenix City resources, both economically, and in human capital. . . . *Most importantly, the damage to the environment and public perception to this plant operation has a serious implication on this facility's future.* The ongoing civil class action law suit at this location can be directly attributed, in part, by this problematic bag filter system. *We must resolve this bag filter leakage problem or the existence of the plant will be in serious jeopardy.* Total liability for the civil suit can easily exceed $500K.

(PX9) (emphases added).

In one February 29, 2000 e-mail, petitioners noted:

> This recent round of problems with Unit 2 bag filters gives us enough history to know that we cannot continue via the current path. *We know that there is an inherent design problem in the filters,* and are currently suffering from another round.

(PX4) (emphasis added).

In a related February 29, 2000 e-mail to Juan Rodriguez (Petitioners' corporate trial representative), plant-level operatives noted, *"This plant is on the verge of shutting down U2 due to a lack of bags to protect the environment."* (PX4)(emphasis added).

Despite knowledge of manufacturing deficiencies and resulting pollution, corporate management refused expenditures because the "payback" (financial return) for necessary expenditures could not be recovered quickly enough. (R. 127; Dkt. 268, Exhibit C, pp. 1-2 following p. 24). In an e-mail dated October 10, 2001, employees debated whether CCC could afford *not* to take action to remedy bag filter defects. CCC plant manager Barry Nicks stated in one e-mail:

> There is something much more critical in this RFE than capital recovery. It is the avoidance of a Civil Law Suit - Class Action. *If we do not get this bagfilter under control so that is not constantly operating with some small leak up to an intolerable leak, then this plant*

> *can become just like Baytown ECI.*[5] *The payback in such a case may be really fast.*

(PX5) (emphasis added).

Rather than make repairs in 1999, 2000, or 2001, Petitioners continued to disregard environmental concerns and the well-being of Respondents. In a round of e-mails on January 17, 2002 (almost one year after the case was filed), CCC Vice President of Operations Juan Rodriguez informed Phenix City plant manager, Barry Nicks, that the company was rejecting the plant's request to fix the Unit 2 bagfilter defects, not because the expenditure would render the plant unprofitable, but because it would not satisfy the defendants' corporate policy of recouping all of the project costs within 2 to 3 years. (R. 126-27; PX13).

Mr. Nicks responded by sending an e-mail to CCC corporate engineer N.L. Lee (which he copied to Rodriguez):

> The bottom line will be that U2 will have a higher filter bag maintenance cost, . . . and (most frightening) the possibility of liability payments to the community (not budgeted). Then there is the potential that the legal side will become so visible and costly, that

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5 The Baytown, Texas ECI facility manufactures carbon black and is a direct competitor of Petitioners. (R. 159). Nicks' purpose in mentioning the Baytown plant was to scare his corporate superiors into thinking that if they did not correct their environmental problems at the Phenix City plant, they would be put out of business. (R. 414 & 415).

> the plant itself will be forced to close due to political pressures. Since the plant generated in excess of $2.0MM Gross Operating Profit for the Company's revenue from its miserable operation during the bad economy of 2001, surely there is value in keeping it operating in future years with sold out parameters, rather than having a closed chemical plant liability.
>
> From my point of view . . . how can we afford NOT TO correct the problem?"

(PX13) (emphasis added). The Unit 2 defects were not resolved before trial.

Petitioners suggest that emissions from the plant were occasional, unavoidable, reported, and promptly corrected. Randy Wangle is the former maintenance supervisor of the plant. (R1330). According to Mr. Wangle, stopping production to repair a leak was a last resort. (R1370).

Wangle testified that carbon black emissions into the environment were visible at the plant. (R1355). Wangle knew about the "chronic bag filter problems, they would bust, the air to cloth was too high," (R1359), and that filter bag ruptures released carbon black into the environment. (R1360-61).

Mr. Wangle described purposeful subterfuge to evade responsibility: carbon black leaks at night were not reported to regulators because they could not be seen by third parties. (R1368). With regulatory authority eluded, the plant ran higher production levels at night. (R1692).

Maintenance employees would not begin looking for "leaks" unless alarms kept going off "frequently within an hour's time." (R1370). Leak detection devices, called triboguards, would be cleaned and restarted without repairing the cause of the leak. (R1370). Frequently carbon black leaks at night were not repaired until morning. (R1369). Petitioners hid their misconduct under cover of night.

Mr. Wangle testified that corporate managers did not have real concern about the carbon black pollution and saw it as "more of a joke." (R. 1353-54). Management *never* stressed that safety, health, and the environment be put first, even though it "knew" that carbon black was "getting out into the environment." (R1355).

Petitioners assert that they used "best available control technology." Pet. at 3. But, in the July 5, 2005 injunctive relief order (Dkt. 295-1), the Court directed Petitioners to make capital improvements and repairs to their operating equipment. (Dkt. 295-2). The Court's Order also imposed a strict timetable to carry out upgrades, and included a schedule of dates for the Petitioners to submit progress reports. (Dkt. 295-1). Had Petitioners taken steps to make these improvements before the filing of this lawsuit or during the three years between its filing and trial, then they might well be in a position to argue their plant used best available control technology. But, the record clearly reflects that because Petitioners made no such efforts, the Court was required nearly a year after the jury's verdict to force Petitioners to take action. (R. 295-1).[6]

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[6] Petitioners' claim regarding their use of "best available control technology" has varied with the perceived exigencies of this litigation. At trial, Petitioners found it advantageous to claim they had used such technology (R. 32, 34) (opening statement), a claim implicitly rejected by the jury. But later,

Given that (1) Petitioners have not given an accurate account of the record, (2) the record reveals a company that resisted addressing a known hazard and instead adopted a pattern of subterfuge, and (3) Petitioners' dishonesty continued during the course of this litigation and beyond trial, resulting in imposition of sanctions against Petitioners post-appeal, which Petitioners have not challenged, this case provides a poor vehicle for review of any conflicts that might exist within the circuits over punitive damages.

II. The Lower Courts Are Not Confused About the Relevant Conduct That Goes Into the Reprehensibility Guideline.

Though they present no question for this Court to decide on this subject, Petitioners assert that the lower courts are in conflict regarding whether they should consider "the full spectrum of punishable conduct" when ascertaining "the degree of reprehensibility." Pet. at 9. In doing so, they ignore the State's interest in defining the misconduct deemed worthy of punitive damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) ("A basic principle of Federalism is that each State may make its own reasoned judgment about what

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using documents withheld from Respondents during pre-trial discovery, Petitioners offered evidence they had made repairs to the operating units (and, implicitly, to their "best available control technology"), "for the *purposes of staving off the injunctive relief* sought by [Respondents] post-trial" – part of the litigation misconduct the District Court found sanctionable post-appeal. Sanctions Op. *at* 13, App. A, *infra*, 24a (emphasis in original). Now, despite having concededly been ordered (without objection) "to replace or repair substantial parts of the Unit I bagfilter system," Pet. at 6; Pet. App. at 48a, Petitioners again claim to have used "best available control technology" in urging review of the Eleventh Circuit's findings on reprehensibility. *See id.* at 3 & 13 n.4.

conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." (citation omitted)). Moreover, they also confound two rightly separate analyses: ascertaining the degree of reprehensibility, and ascertaining appropriate damages once reprehensibility has been decided.

This Court has provided clear guidance on the question of how to determine whether the degree of reprehensibility supports the amount of punitive damages assessed. The lower courts – including the courts singled out by Petitioners – have exhibited no trouble applying it.

In *State Farm*, this Court counseled:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

538 U.S. at 419.

The circuits have recognized the importance of these aggravating factors in assessing the reprehensibility determination, and no conflict exists between the circuits. *See, e.g., Action Marine, Inc. v.*

Continental Carbon Inc., 481 F.3d 1302, 1318-19 (11th Cir. 2007); *CGB Occupational Therapy, Inc. v. RHA Health Serv., Inc.*, ___ F.3d ___, 2007 WL 2390386 at *3 (3d Cir. 2007); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 153 (6th Cir. 2007); *Diesel Mach., Inc. v. B.R. Lee Indust., Inc.*, 418 F.3d 820, 839 (8th Cir. 2005); *Bains LLC v. Arco Prod. Co., Div. of Atlantic Richfield Co.*, 405 F.3d 764, 775 (9th Cir. 2005); *Rain Bird Corp. v. National Pump Co. LLC*, 144 Fed. App'x 373, 376 (Fed. Cir. 2005); and *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63 (2d Cir. 2004). And, the Eleventh Circuit properly applied these factors in making its reprehensibility determination in this case. Pet. App. at 23a-26a.

III. Three *BMW* Guideposts – Reprehensibility, Comparability, and Proportionality – Are and Must Remain Independent

BMW establishes three independent guideposts – reprehensibility, proportionality, and comparability. Petitioners suggest that a comparative element, identical to that utilized in considering the third *BMW* guidepost (comparability), be added to the first *BMW* guidepost (reprehensibility) for purposes of determining the proportionality of the punishment to the offense, the essence of the second *BMW* guidepost. Such an approach collapses all three *BMW* guideposts into a single one in a manner that detracts from the centrality of reprehensibility as the "most important indicium of the reasonableness of a punitive damage award," and double counts the importance of the other two guideposts. *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996).

Equally important, it would transform the historically validated test that requires that punitive damages match the "'enormity of the offense'", *see id* (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)), into a comparison that would burden the existing process with evidence of the facts in other cases in order

to make meaningful comparisons. Punitive damages reflect the jury's "moral condemnation" of the misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Necessarily, the determination of the level of appropriate moral outrage any given fact pattern entails is more properly a jury question. *Compare id.* at 437 n.11 (recognizing the jury's primacy in fact-sensitive punitive damage amount determinations) *with id.* at 440 (recognizing trial court's greater institutional competence in evaluating evidence material to the reprehensibility guidepost). Thus, it would be the function of the jury to make the type of novel record comparison Petitioners propose, massively complicating – and changing the historical understanding of – the punitive damage phase of the trial.

Certainly, in applying those considerations in *State Farm*, this Court did not engage in the kind of analysis Petitioners argue is constitutionally required: "compar[ing] the misconduct at issue *to the conduct in other punitive damages cases.*" Pet. at 11 (emphasis added). *See State Farm*, 538 U.S. at 419. The reason is simple: deciding whether a given case falls into a given category does not require knowledge of whether any other case falls into that category. The cases Petitioners cite apply this test without consternation and do not engage in a comparative analysis in order to assess degree of reprehensibility. *See Bains v. Arco Prod. Co.*, 405 F.3d 764, 775 (9th Cir. 2005); *Asa-Brandt v. ADAM Investor Serv., Inc.*, 344 F.3d 738, 746-47 (8th Cir. 2003); *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 75-76 (Cal. 2005); *Goddard v. Farmers Ins. Co. of Or.*, 120 P.3d 1260, 1281-82 (Or. App. 2005).

Some of these cases do use a comparative analysis, but for a separate purpose, one recognized separately in this Court's decisions in *BMW* and *State Farm*: assessing the amount of damages appropriate once a degree of

reprehensibility is ascertained. For example, the court in *Planned Parenthood of Columbia/Willamette, Inc v. American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005), Pet. at 12, extensively discusses potentially similar cases for purposes of ascertaining the amount of damages, *id.* at 954-57, but does not engage in a similar discussion regarding degree of reprehensibility. *Id.* at 958-60.

Petitioners acknowledge that the court below considered it appropriate to engage in comparative analysis to determine the amount of an award. Pet. at 10 (quoting the court below: "'the fact that an award is significantly larger than an award in apparently similar circumstances'" could affect the analysis of how large an award should be). Petitioners fail to note, however, that the lower court found that none of the instances Petitioners had proposed for comparison were, in fact, similar to the case at hand. Pet. App. at 26a. Petitioners do not challenge that finding with regard to the cases it put before the lower court. The question of whether similarly situated parties were treated differently is not raised by this case.

Petitioners characterize the conduct for which they are being punished as "the failure to do more to prevent periodic releases of carbon black during the manufacturing process." Pet. at 11-12. *See also* Pet. at 12 ("periodic failure to prevent carbon black releases.") The lower courts characterized Petitioners' conduct differently and eloquently.

The District Court noted, "[t]he evidence before the jury established a pattern of intentional conduct on the part of [Petitioners] leading to repeated" trespasses. Pet. App. at 43a-44a. "This misconduct included bolstering profits rather than remedying known defects . . . and a less than honest approach to their dealings" with injured parties. Pet. App. at 44a.

The Court of Appeals, affirming, said:

> With respect to the pattern and duration of Continental's intentional misconduct, the events at issue spanned more than five years, and Continental continued its course of action and inaction undeterred by both the prospect and reality of litigation. In addition, the harm inflicted cannot adequately be characterized as solely economic. Continental's actions resulted in the destruction of a once successful business and interfered with the use and enjoyment of municipal property. . . .
>
> The evidence also demonstrated Continental's willingness to elude accountability. . . .
>
> Finally, we note that Continental's actions likely harmed a great number of people and businesses who are not parties to this litigation.

Pet. App. at 25a-26a.

There is little wonder that the cases Petitioners considered worthy of comparison were properly rejected by the lower courts as inadequate to cover the same level of reprehensibility as occurred here. The only proper conclusion is that the degree of reprehensibility of Petitioners' conduct was properly and accurately ascertained.

IV. There Is No Legal Conflict to Resolve Over the Proper Ratio Between "Substantial"

Compensatory Awards and Punitive Damages.

Petitioners claim that there is a conflict among the federal circuits regarding the maximum ratio permitted when the compensatory damages awarded are "substantial." Pet. at 14-18. To assert that novel proposition, Petitioners claim that this Court has established a 1:1 ratio ceiling as a "constitutional maximum," Pet. at 18, relying on language in *State Farm*, which cannot be viewed as creating the categorical limit Petitioners assert it does. 538 U.S. at 425.

In advancing this unjustified claim, Petitioners manufacture a mathematical bright-line strait-jacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together – and so states in the very case Petitioners assert held otherwise. *See State Farm*, 538 U.S. at 424-25 ("[w]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline *again* to impose a bright-line ratio which a punitive damages award cannot exceed.") (emphasis added; citations omitted). *See also BMW*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.").

In fact, the same paragraph in *State Farm* that suggested a single-digit ratio was "perhaps" appropriate when the compensatory award was "substantial" reiterated that "there are no rigid benchmarks that a punitive damages award may not surpass" and that "[t]he precise award in any case, of course, must be based upon

the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

For that reason, it is entirely improper for Petitioners, in seeking to manufacture an artificial conflict, to take the few cases across the circuits that have both substantial compensatory damage awards as well as punitive damages and compare whether they fall uniformly within a 1:1 ratio, as Petitioners suggest. Such an examination utterly ignores the fact-sensitive nature of the type of review this Court has authorized. Moreover, it elevates "ratio" into the conclusive measure of "gross excessiveness," undermines the preeminence that this Court has accorded to the reprehensibility guidepost, and turns judicial review of punitive damage awards into nothing more than an exercise in elementary-school mathematics.

Even if this Court were inclined to speak further about mandatory ratios, granting review in this case, based on this record, would only encourage other parties to hide responsibility through falsehoods and obfuscation, to compound their egregious behavior through litigation misconduct, and to continue such behavior with impunity, knowing that, if caught, their punitive liability is capped at whatever their compensatory liability is. Simply put, they would have no incentive to stop misconduct that warrants punishment.[7]

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[7] Petitioners' coldly calculated choice not to repair, before verdict, the known problems that directly caused Respondents' damages provides a prime illustration. Petitioner Continental Carbon's president testified repairs were not authorized to Unit One because the Petitioners could earn more than a 582% return on that investment, if made elsewhere. (Dkt. 268, Ex. C, pp. 1-2 following p. 24). Imposition of a maximum ratio of punitive to compensatory damages of 1:1, thereby capping

V. The Lower Courts' Treatment of Civil Penalties Does Not Require This Court's Intervention.

This Court has given the third *BMW* guidepost, comparability, a lesser level of importance than it has accorded to the other guideposts. In *State Farm*, it found the most relevant civil penalty to be $10,000 and suggested that an appropriate punitive damage award would be on the order of $1 million. *State Farm*, 538 U.S. at 428. Petitioners seek to enhance the relevance of this guidepost in their third question presented, through which they seek to require courts to determine how realistic it is that a penalty be assessed before using it for comparative purposes.

Petitioners' initial premise guiding their argument is erroneous. In *State Farm*, this Court did not hold that it was wrong to consider the possible loss of a license, disgorgement of profits, or even possible imprisonment, as Petitioners contend. Pet. at 19. Instead, this Court found the Utah Supreme Court's use of those considerations was irrevocably tainted by their dependence on evidence of a "broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct" that this Court held was improperly considered in arriving at the award. *State Farm*, 538 U.S. at 428. Thus, this Court has held not that such considerations are improper, but instead that they must be limited to the misconduct properly before the jury.

Because there is no mandate to avoid consideration of other relevant potential sanctions, courts

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punitive liability at whatever the amount of compensatory liability, would not even disgorge Petitioners of the unjust gain they realized from diverting the needed investment in repairs to Unit One to other, more lucrative returns.

are not divided on the question, despite Petitioners' claim that they are. *See* Pet. at 19. Much like Petitioners' skewed characterization of this Court's statement in *State Farm*, Petitioners have given short shrift to what courts have actually done in response. A faithful reading of the cases reveals no conflict that should engage this Court's attention.

For example, Petitioners cite *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005), which used as a comparative factor the civil penalty that the "parties agree[d was] most applicable," a fine under the state's unfair insurance practices law. It is difficult to accuse a court of using an unrealistic and speculative civil penalty when it is the product of agreement between the parties.

Petitioners also cite *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003), where the court indicated that the parties, unhelpfully, had failed to "present[] evidence concerning the regulatory or criminal penalties to which the defendant exposed itself by deliberately exposing its customers to a substantial risk of being bitten by bedbugs." Even so, the court took "judicial notice that deliberate exposure of hotel guests to the health risks created by insect infestations exposes the hotel's owner to sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to the punitive damage award in this case." *Id.* Rather than rely solely on the possibility that the Defendant could have lost its license, as Petitioners suggest, the court related the amount of punitive damage to the fine and cited a case in which a corporate official was actually imprisoned for violation of the applicable law. *Id.* Given the realism in which the Seventh Circuit grounded its decision, it can hardly be described as rampantly speculative, contrary to Petitioners' portrayal.

Petitioners also cite the unpublished decision in *Greenberg v. Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir.), *cert. denied*, 542 U.S. 939 (2004), which engaged in no analysis and has no precedential value. Finally, Petitioners decry a state supreme court's conclusion that, if enforced, federal daily fines for a railroad's 450-day violation of a clear-sight rule, which resulted in a death, totaled $9.9 million and that the state's separate sanctions of the misfeasance that would add $186,000 per year in fines, were not so out of line with a $25 million award as to require its reduction. *Union Pac. R.R. v. Barber*, 149 S.W.3d 325, 350 (Ark. 2004). None of these decisions demonstrate a flaunting of this Court's instructions, Petitioners' suggestion notwithstanding.

VI. This Case Does Not Present a Vehicle to Define More Clearly This Court's Punitive Damage Jurisprudence.

Separate and apart from the "unclean hands" Petitioners bring to this case and the legal issues that they raise, Petitioners' request for clarification of this Court's punitive damages jurisprudence, Pet. at 23, rings hollow in light of what Petitioners assert those cases hold.

First, Petitioners complain that there is a "tendency [among] many courts to apply the [*BMW*] guideposts mechanically." Pet. at 23. Yet, Petitioners' preferred solution is to establish a far more mechanical ratio of precisely the type this Court has resisted, one that would operate without consideration of the behavior that merited the punitive damages. Contrary to Petitioners' entreaties, the Due Process Clause contains no numerical limits and instead requires the type of careful weighing of evidence that courts have uniformly endeavored to employ in evaluating the propriety of punitive awards. *See State Farm*, 538 U.S. at 425 (the

"precise award . . . must be based on facts and circumstances" of the case).

Second, Petitioners claim that defendants are being punished even if their culpability, after having paid compensatory damages, is not sufficiently reprehensible to merit punitive damages.[8] Pet. at 23.[9] Yet, as examples

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[8] Petitioners assert that an award of attorneys fees in the amount of $1,294,000 has "punitive and deterrent effects" that should lower the punitive damages. Pet. at 17. As a matter of state law, that award is compensatory. Pet. App. 22a-28a. A grant of certiorari in this case would require resolution of whether that independent finding of state law could be ignored in applying the *BMW/State Farm* factors.

[9] Petitioners suggest in their second Question Presented that (1) "substantial" compensatory damages, "significant" attorney's fees, and/or "extensive" injunctive relief should confine permissible punitive damages to no more than a 1:1 ratio to such other relief, and (2) courts conflict in their treatment of fees as a factor to reduce, rather than increase, the maximum permissible punitive award. Pet. at i, 17-18.

But, the first suggestion ignores the distinct and well-settled differences in the primary purposes of each such type of relief. Whereas punitive damages seek to punish a defendant's unlawful conduct and to deter repetition of similar behavior by others, *e.g.*, *State Farm*, 538 U.S. at 416; *Cooper Indus.*, 532 U.S. at 432; *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 n.9 (1986), compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm*, 538 U.S. at 416 (quoting *Cooper Indust.*, 532 U.S. at 432; *see also, e.g., Memphis Cmty Sch. Dist.*, 477 U.S. at 306-07. Similarly, attorneys fees, in those limited circumstances under which such awards are authorized here, are awarded to compensate an injured party to avoid further injury "by the cost incurred as a result of the necessity of seeking legal redress for [the party's] legitimate grievances." *City of Warner Robins v. Holt*, 470 S.E.2d 238, 240 (Ga. App. 1996) (*see, e.g., Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.22

of their claim that the majority of courts cross the constitutional line on this question, they rely entirely on cases where the ratio is merely more than 1:1, with the majority of those cases still falling well within a single-digit ratio and having been decided before 2003, the year of this Court's decision in *State Farm*. Pet. at 27 n.12.

Petitioners make no attempt to evaluate the factual circumstances of the misconduct in the cases they cite, and they ignore the vast empirical evidence that demonstrates that few punitive damage awards reach eye-popping amounts. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001*, NCJ 208445, at 8 tbl. 9 (Mar. 2005) (finding, based on the most recent available statistics, that the median inflation-adjusted punitive award was only $50,000 in 2001, compared with $63,000 in 1992). Their presentation, calling the majority of courts roguish in their flaunting of this Court's holdings, is wrong, fails to consider the record before those courts, and cannot establish an issue worthy of a grant of certiorari.

(1985)). Injunctive relief likewise is not imposed as punishment, but instead lies only where there is no adequate remedy in damages at law.

Petitioners' second suggestion founders on an illusory and undeveloped "conflict" assertedly resting upon only one state supreme court decision (in dictum) and one intermediate appellate court decision in which the fee award were, respectively, less than 2 percent of the size of the punitive award and less than 10 percent of the size of the punitive award. Pet. at 17-18 (citing *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. 2003), and *Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507 (Cal. Ct. App. 2007). The absence of clear conflict and, even if such conflict were present, the immature stage of such conflict reflect a "dispute" insufficiently developed to warrant exercise of this Court's supervisory discretion.

Third, Petitioners resolutely ignore what this Court has found to be the first consideration in any punitive damages evaluation – the States' legitimate interest in punishing unlawful conduct and deterring its repetition. *See Phillip Morris USA v. Williams*, 127 S.Ct. 1057, 1062 (2007); *BMW*, 517 U.S. 559, 568 (1996) ("Federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve."). States have different interests that are pursued differently with respect to punitive damages. *Id.* ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."). For example, in Alabama punitive damages substitute for the role that other states assign to compensatory damages in wrongful death actions. *See Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1218 (Ala. 1999). In some states, the State's interest is expressed by allocating significant portions of a punitive damage award to public purposes. *See, e.g.*, Ind. Code § 34-51-3-6 (75 percent). In Georgia, whose law governed this award, punitive damages are capped at $250,000 per plaintiff, unless there is a finding of a specific intent to cause harm, as was found here.[10] *See* O.C.G.A § 51-12-5.1(f), (g).

Such differences in State treatment of punitive damages make the purely ratio-based comparison advocated by Petitioners at odds with the federalist system adopted by our Constitution. It would complicate, rather than make more predictable, the determination and review of punitive damages, serving no useful practical purpose, let alone any proper constitutional one. To present a proper case for review by this Court, a

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[10] Petitioners do not contest the jury's finding on this point in their petition.

petitioner should bear the burden of proving, based on an accurate rendition of the record, that a lower award would be sufficient to vindicate the particular State's defined interest in a manner that the lower courts failed to appreciate. Pure numerical comparisons can never substitute for such a showing – and no attempt to make the proper, necessary showing is contained in Petitioners' application to this Court. It must therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 26, 2007 *Counsel for Respondents*

APPENDIX

Appendix A

United States District Court
M.D. Alabama, Eastern Division.

ACTION MARINE, INC., et al., Plaintiffs,
v.
CONTINENTALCARBON, INC., et al., Defendants.

No. 3:01-cv-994-MEF[1]
Aug. 9, 2007.

Daniel W. Lee, La Grange, GA, David B. Byrne, III, Jere L. Beasley, Rhon E. Jones, Beasley Allen Crown Methvin Portis & Miles PC, Montgomery, AL, Edward Reed Jackson, James C. Brakefield, Tweedy, Jackson, Beech & Fikes, Jasper, AL, Jeffrey Edwin Friedman, Friedman Leak Dazzio Zulanas & Bowling, PC, Birmingham, AL, for Plaintiffs.

Anthony Ching, Rancho Cucamonga, CA, Clifford Carrington Brady, Brady Radcliff & Brown, LLP, Mobile, AL, Evan Mark Tager, Mayer Brown Rowe & Maw LLP, Washington, DC, H. Thomas Wells, Jr., Jarred O. Taylor, II, Maynard, Cooper & Gale, P.C., Birmingham, AL, J. Brett Busby, Mayer Brown Rowe & Maw LLP, Houston, TX, Peter Sean Fruin, Maynard Cooper & Gale, PC, Montgomery, AL, Sam E. Loftin, Loftin Loftin & Hall, Phenix City, AL, for Defendants.

MARK E. FULLER, Chief United States District Judge.

*1 On June 13, 2007, the United States Magistrate Judge entered a Recommendation (Doc. # 360) that sanctions be imposed against defendants because they withheld evidence during pretrial

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[1] Only the Westlaw citation is currently available.

discovery in bad faith and in violation of prior orders of this Court. The Magistrate Judge found that because of defendants' discovery violations, the plaintiffs were prejudiced in their presentation of evidence to the jury and on appeal. On June 26, 2007, defendants filed Defendants' Objections to Magistrate Judge Capel's June 13, 2007, [sic] Report and Recommendation (Doc. # 361).

As an initial matter, the Court finds that the defendants' objections to the Recommendation of the Magistrate Judge are largely without merit and most of the objections are due to be overruled. Indeed, in nearly all respects, the Court is persuaded by the factual findings and the legal reasoning of the Magistrate Judge set forth in the Recommendation.

Accordingly, after an independent review of the entire file in this matter, it is the ORDER, JUDGMENT, and DECREE of the Court:

a. That the objections filed by defendants (Doc. # 361), are OVERRULED in part and SUSTAINED in part as set forth below;

b. To the extent that the Recommendation (Doc. # 360) includes punitive sanctions of $26,470 payable to the Court, the Recommendation is REJECTED and the defendants' objection to that portion of the Recommendation is SUSTAINED. In all other respects, the defendants' objections are OVERRULED and the Recommendation of the Magistrate Judge (Doc. # 360) is ACCEPTED and hereby ADOPTED as the opinion of this Court;

c. To the extent that plaintiffs' motions (Doc. # 293, Doc. # 308, and Doc. # 308-1) seek an award of monetary sanctions against defendants for their conduct during discovery, those motions are GRANTED. Consistent with the Recommendation of the Magistrate Judge (Doc. # 360), it is hereby ORDERED that sanctions are imposed against Continental Carbon Company, Inc. and China Synthetic Rubber Corporation, jointly and severally, in the amount of $120,945.59.

WALLACE CAPEL, JR., United States Magistrate Judge.

This cause is now before the Court on the Plaintiffs' (collectively, "the property owners") [FN1] objections and motion to reconsider the magistrate judge's order denying sanctions (Doc. 346). The district court instructed the magistrate judge to consider "[a]ll issues relating to the appropriateness of monetary sanctions against defendants (collectively, "Continental") [FN2] raised by plaintiffs' motions (Doc. 293, Doc. 308, Doc. 308-1) [FN3] and all submissions in support of plaintiffs' requests for monetary sanctions as a penalty for alleged discovery violations" (Doc. 347).

Both parties have been given notice as to the discovery violations, have been given great latitude in their presentation of the issue of monetary sanctions, and have argued their positions at several evidentiary hearings held on January 19, 2005 ("Tr1"), August 18, 2005 ("Tr 2") (*sealed* in part) and November 10, 2005 (Doc. 349), extending over a period of three days. In addition, this court has reviewed in detail all of the exhibits produced by both the property owners and Continental in response to this court's previous orders, taken into consideration Continental's assertions as to attorney-client privilege, and has taken judicial notice of the entire record for purposes of this motion. Thus, fully illuminated by the parties, and taking into consideration the briefs and arguments of the parties, recommendation is made to the district court.

*2 Upon consideration of this matter, as further set forth herein, it is the recommendation of the magistrate judge that the motion for monetary sanctions be GRANTED.

The court will briefly review the history of this case to provide a sense of perspective before assessing the property owners' motion for reconsideration regarding monetary sanctions. Below is a discussion of the underlying dispute and the discovery battles that ensued for almost three-and-a-half years before this case was brought to trial.

A. Factual allegations

In August of 2001, the City, Action Marine and Tharpe brought a class action lawsuit for negligence, wanton conduct, breach of duty to warn, fraud, misrepresentation, deceit, nuisance, trespass, and strict liability.[FN4] The property owners claimed that emissions from CCC's Phenix City, Alabama plant damaged their property and health. It was alleged that 200 million pounds of a substance known as "carbon black,"and its associated waste gases, were emitted annually exposing surrounding residents to the toxins from the gases, and their property to dustings of the black and sticky carbon black substance. The City claimed damage to the Columbus Civic Center, the South Commons Sports and Entertainment Complex as well as Rigdon Park. Action Marine and Tharpe claimed damage to its inventory of boats and for the lost value of its business. Ditchfield sought damages for emotional distress, cleanup costs and for the diminution in value of his properties. In response, CCC claimed that no such pollutants were harmfully emitted from its plant to cause the property owners' damage. CSRC claimed that it did not exercise supervision and control over CCC, and as a result, were not directly liable to the property owners for any pollution from the plant.

Trial was held for ten days in August of 2004. The jury found Continental liable for nuisance, trespass, negligence, wanton and wilful conduct, and awarded compensatory damages in the amounts of $1.2 million to Action Marine, $570,000 to the City, $100,000 to Tharpe and $45,000 to Ditchfield. The jury also awarded $1,294,000 in attorneys fees and assessed punitive damages in the amount of $17.5 million. Final judgment was entered on January 31, 2005, and costs were taxed against Continental.[FN5] The judgment was appealed, and the Eleventh Circuit Court of Appeals upheld the verdict.[FN6]

B. Pertinent discovery history

Over the course of this hotly-contested litigation, requests for production of documents, interrogatories, requests for admissions, deposition requests and many court orders were generated in

connection with fleshing out the pertinent facts associated with the allegations brought by the property owners in this case. The property owners in their brief, and at the three hearings, as well as in many motions, outlined in detail the pertinent discovery requests made, and Continental's response to those requests. In response to this court's request to docket the alleged documents wrongfully withheld, the magistrate judge directed the property owners to submit the 19 individualized analytical charts, labeled Charts A through Chart S (consisting of 285 typewritten pages), to assist in the review of the alleged pretrial discovery abuses (Doc. 316). These Charts (Doc. 317, collectively the "PT charts") coincide with the actual documents withheld, Exhibits A through S (Doc. 293, collectively the "PT documents").

*3 The initial disclosure request of November 30, 2001, was general and asked for plant and equipment related documents, production and communications records relating to production of carbon black at the plant, and product data and installation records relating to equipment used to manufacture carbon black. The subsequent discovery requests became more specific. The PT charts outlined certain documents that were requested, but not disclosed, by the property owners prior to trial.

Chart A traced violations back to some of the original document requests generated in this case:

1. December 13, 2001: Property Owners' Requests for Production

Request 8 asked Continental to:

Produce copies of *any and all internal memos, emails, or any other type of communication discussing carbon black dust emissions or pollution,* either internally or with third parties, and complaints from citizens surrounding the Phenix City ContinentalCarbon plant ["the plant"].

Request 13 asked Continental to:

Produce copies of any *logs and/or monitoring reports and/or*

summaries relating to emission control, or prevention of emission of carbon black particulate matter into the environment from [the plant].

Request 16 asked Continental to:

Produce "*plant and equipment related documents data relating to the equipment currently used to manufacture carbon black* [and] installation records relating to equipment installed at [the plant].

(Doc. 317-2, pp. 1-2, *emphasis supplied).*

Continental's response to requests (8) and (16) was that the requests were overly broad and unduly burdensome and, to request (13) that it was vague and unclear, but that CCC would "produce such documents that are responsive to this request and that have been located after a reasonable review of corporate records."As to other responses, CCC would supply documents after "entry of an appropriate protective order"(Doc. 317-2, p. 6-7).

2. January 28, 2003: Property Owners' Second Consolidated Discovery Requests

In light of the original documents received, the property owners asked for certain admissions in their second consolidated request. Those included admissions that (1) CCC experienced problems with its bag filter systems at the plant, (2) CCC had frequent bag filter failures, and (3) bag filter failures resulted in carbon black emissions. In addition, the property owners requested further documents.

Request 3 asked Continental to:

Produce copies of all cost estimates, reports, executive summaries, or evaluations for continenal [*sic*] Carbon Company concerning environmental issues and improvements for the bag filter compartments at the Phenix City plant from 1998 to the present.

Request 4 asked Continental to:

Produce all emails within ContinentalCarbon Company

concerning economic justification and/or economic evaluation of improvements to the main bag filter system bag filters, and filter bags at [the plant] from 1998 to the present.

*4 Request 5 asked Continental to:

Produce all studies, reports and evaluations of carbon black leaks, spills, or discharges occurring as a result of reported, broken or torn bag filters or filter bags at [the plant].

(Doc. 317-2, p. 3).

The requests in Chart A established that the property owners requested (1) internal memorandum, emails, or any other type of communication discussing carbon black dust emissions or pollution, either internally or with third parties, (2) logs and/or monitoring reports and/or summaries relating to emission controls, or prevention of emissions of carbon black particulate matter into the environment from the plant, (3) data relating to the equipment currently used to manufacture carbon black, and installation records relating to equipment installed at the plant, (4) cost estimates, reports, executive summaries for improvements for the bag filter compartments at the Phenix City plant, (5) economic justification and/or economic evaluation of improvements to the main bag filter system bag filters, and filter bags at the plant, and (6) studies, reports and evaluations of carbon black leaks, spills, or discharges occurring as a result of reported, broken or torn bag filters or filter bags at the plant. The discovery violations addressed in this recommendation emanate primarily from the above requests.

In response to these requests, Continental identified that it produced records pertaining to maintenance, repair and design of equipment used in the carbon black production process, including bag filter compartments and related equipment (Doc. 317-2, p. 1-4). Yet it also claimed the property owners' requests were vague, ambiguous and unintelligible in using "bag filter"and "filter bag"as separate terms; burdensome, oppressive, vague, ambiguous,

and/or overly broad as to time period and scope; and that the information was not relevant to the subject matter of the litigation and not reasonably calculated to lead to the discovery of admissible evidence. Continental objected to other requests on similar grounds (Doc 317-2, p. 7-9).

The property owners brought motions to compel on February 18 and March 13, 2003 (Docs.92, 98). On March 18, 2003, the court advised that failure to properly respond to discovery requests in good faith could lead to sanctions (Doc. 101). On April 11, 2003, the court ordered supplementation of Rule 26 disclosures and ordered the retention of all records in the parties' possession throughout the pendency of the litigation (Doc. 111).

On March 25, 2003, the property owners brought motions to (1) compel discovery responses and for an order compelling corporate representatives for deposition, (2) reported to the court on outstanding discovery issues, and (3) prepared a brief in support of it motions (Docs.104, 105, 106, 109). Discovery status conferences were held on March 28, 2003 (Doc. 107), and April 4, 2003 (Doc. 110, placed under *seal*). On April 4, 2003, the court ordered the parties to supplement their Rule 26 disclosures (Doc. 117).

***5** Document inquiries were made by interrogatories prior to the depositions of the president of CSRC, Dr. Peter Wu ("Wu") on April 21, 2003, again addressing emails, documents, memoranda, reports, notes, letters, or communications of any and all kinds that he prepared, received or reviewed pertaining to CCC's environmental matters, capital or operational expenditure proposals and/or plant equipment problems. Wu's response was "I do not receive detailed operation reports pertaining to environmental matters or plant equipment problems at the Phenix City plant"(Doc 317-2, p. 10). Continental fought to prevent answers to the property owners' inquiries to Wu by arguing later at hearing that disclosures by interrogatories could only be addressed to party defendants.

On April 11, 2003, Continental was ordered to produce corporate representatives, Kim Pan ("Pan"), Leslie Ku ("Ku") and Wu for depositions (Doc. 112). On April 14, 2003, the magistrate judge allowed in her order for the property owners to propound 10 written interrogatories on Ku and Wu, and that these individuals should respond on or before May 5, 2003 (Doc. 113). As of September 4, 2003, Pan's deposition had not been completed because Continental had not disclosed documents requested for deposition which included the weekly/monthly operations reports concerning environmental issues with CCC. Continental continued to refuse to schedule the deposition of Wu, and other employees and officers. Though they were requested in the property owners' motion of March 25, 2003, requests for expenditure reports ("RFE's"), regarding pollution controls, had not been produced. In addition, the *in-camera* documents still had not been produced at this time (Doc. 132). The district judge denied the property owners' motions regarding discovery issues until class certification had been decided (Doc. 148). After the class certification was denied, the property owners renewed their motions to compel the depositions of Pan and Rodriguez, and this motion was granted on February 21, 2004 (Doc. 165).

On April 29, 2003, a hearing was held *in camera* and under *seal* because the property owners had obtained documents from non-party sources that were not previously disclosed by Continental (*See*, Doc. 117, p. 2, *in camera* Docs. P-1 through P-106). The property owners claimed that the subject documents supported its claim in prior motions that Continental intentionally suppressed documents going directly to issues that Continental had denied, including:

(a) The company's knowledge of the discharge of carbon black dust on the surrounding community;

(b) The causes of the problem;

(c) The names of those persons with knowledge of the

environmental and operational problems at the plaint [*sic*];

(d) Proposed cures and remedies for the pollution, operation and environmental problems;

(e) Delays in implementing corrections to the plant's operational and environmental problems; and

***6** (f) The costs involved correcting operational and environmental problems versus delays in making the corrections.

(Doc. # 117, p. 3).

The documents were placed under *seal* so that Continental was prevented from tailoring its responses so as to produce only those documents already in the possession of the property owners. The same documents were later offered for evidentiary submission by the property owners in response to Continental's Motion for Summary Judgment that was based in part upon Continental's assertion that CSRC "played no role"in the daily operations of CCC (Doc. 120, p. 2). At that point, the *sealed* documents still had not been produced by Continental.

The property owners requested another set of documents prior to the deposition of the president of CCC, Pan, on February 10, 2004. The property owners requested (1) all reports evaluating or explaining problems of any type of bag filters at the plant, and all reports of pollution, emissions, or fugitive releases of carbon black at the plant directed to management of CCC in Houston or to CSRC, (2) RFEs, executive summaries that pertained to the same, and (3) studies, reports and evaluations of carbon black leaks, spills, or discharges occurring as a result of reported, broken or torn bags at the plant. Similar documents were requested prior to the deposition of the Vice President of Operations for CCC, Juan Rodriguez ("Rodriguez") (Doc. 317-2, p. 3-6). On February 12, 2004, Continental was compelled to allow the depositions of Pan and Rodriguez (Doc. 165). Discovery cut-off was set for June 18, 2004 (Doc. 162). Issues of summary judgment were decided on June, 25, 2004 (Doc. 175).[FN7]

In light of the property owners' renewed motion to compel discovery, and after a hearing on the matter before the magistrate judge on August 6, 2004, the court granted plaintiff's motion to compel discovery of "redacted"documents, thermal oxidizer data, Triboguard readings, documents from the privilege log, predecessor documents, and to produce certain witnesses for trial (Doc. 192). Acutely aware of the discovery struggles that had taken place over the prior years, and responding to the Continental's objections to and appeal from the magistrate judge's August 6, 2004 order compelling discovery of a host of documents not yet provided, or provided only in part (redacted documents), the district court gave a final pre-trial warning in its order of August 10, 2004: "*The parties are hereby advised that failure to fully comply with the letter and spirit [of this Order] will result in the imposition of sanctions which will be swift in coming and painful in execution*" (Doc. 195, *emphasis supplied*).

The district judge overruled Continental's objections as to this order on August, 10, 2004, with another warning from the court as to cooperation (Doc. 195). Trial began on August 11, 2004.

Subsequent to trial, the property owners requested injunctive relief in accordance with the favorable judgment awarded by the jury. Permanent injunctive relief was granted on January 31, 2005, and a new discovery schedule was issued on all issues relating to the nature and scope of the injunctive relief. Responding to this issue, Continental submitted certain supplemental evidence.

***7** The district court, in an order dated January 31, 2005, denying the property owners' request to strike certain documents from the post-judgment consideration of injunctive relief, made this commentary as to Continental's conduct:

Defendants' admitted failure to comply with the letter and the spirit of the Federal Rules of Civil Procedure regarding discovery is deeply troubling to this Court. Indeed, given that *Defendants*

and their counsel have exhibited what can only be described as a pattern of disregard for the Federal Rules of Civil Procedure concerning discovery and this Court's prior discovery orders, the Court firmly believes that Defendants and their counsel are due to suffer some adverse consequences for their conduct. Despite this belief, the Court cannot find that the sanctions requested by Plaintiffs may be imposed pursuant to Rule 37(c)(1).

(Doc. 238, *emphasis supplied; see also* Doc. 293).

The property owners alleged that between March 28 and April 6, 2005, Continental produced 98,939 pages of documents that were both responsive to the property owners' new discovery requests, and which were discovered in a related state case filed in the Circuit Court of Russell County, Alabama (Doc. 293, p. 2).[FN8] Continental then produced another array of documents in May of 2005. All told there were over 100,000 pages of documents subsequently disclosed post-trial (Doc. 349:6). After reviewing the documents submitted by Continental, the property owners brought a motion claiming that Continental was now producing PT documents that they had never seen before, and which should have been provided prior to trial (PT documents, Exhibits A through S; *see also* PT Charts A through S). The property owners argue that this small batch of undisclosed documents was used to demonstrate Continental's intentional scheme to withhold large categories of documents (Doc. 349:7). Exhibits A through O involve a series of communications concerning a policy established by Continental as early as February of 2004 to withhold documents. The documents were offered to establish that top officials at CCC and CSRC agreed to hide evidence of environmental issues by filtering them though outside counsel, Tony Ching ("Ching"), for the purpose of claiming attorney-client privilege. Among the property owners requests were "any additional or further sanctions against Continental that the Court deems appropriate under the circumstances"(Doc. 230).[FN9]

The district court made further commentary as to

Continental's actions in their order of August 19, 2005. At that juncture, the property owners' had requested that the court supplement the record with the PT documents for purposes of Continental's appeal:

The Court held a hearing on this matter on August 18, 2005. *Defendants have established a pattern of conduct during the course of this litigation which is far from exemplary. In this Court's view their admitted decision to stop supplementing prior discovery responses or disclosures as of the end of December of 2003 cannot be justified as good faith compliance with either the orders of this Court or the letter and the spirit of the Federal Rules of Civil Procedure.*As this Court has previously observed, given that Defendants and their counsel have exhibited what can only be described as a pattern of disregard for the Federal Rules of Civil Procedure concerning discovery and this Court's prior discovery orders, the Court firmly believes that Defendants and their counsel are due to suffer some adverse consequences for their conduct.

*8 (Doc. 306, *emphasis supplied*).

In the same order, the court referred the matter to the magistrate judge for a ruling on monetary sanctions. The magistrate judge directed the property owners to provide a definitive sum as to sanctions, and to itemized attorney fees and expenses. In the property owners supplemental motion (Doc. 308, 308-1), they addressed the issue of monetary sanctions and provided an itemization of cost and attorney fees incurred in pursuing the post-trial motion regarding evidence wrongfully withheld. On November 10, 2005, the magistrate judge conducted a hearing on the property owners' supplemental motion. The property owners admitted additional exhibits containing other documents which Continental failed to produce prior to trial (Exhibits "Z," "AA" and "DD", Doc. 349:12-16).

These additional documents were produced to prove the

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connection between CCC and CSRC. Exhibit "Z" was an email to president Pan of CCC, and president Wu of CSRC (it was also sent to attorney Ching), suggesting a scheme to withhold evidence by routing documents through Ching. At the hearing, defense counsel for Continental affirmatively represented that no legal advice was sought or given in response to these documents (Doc. 349:32). Exhibit "DD" is a report that compiles monthly data of environmental problems relating to every single plant CSRC parented, including CCC (Doc. 349:15-17). Continental claimed "AA" was not in existence at the time of trial.

At the November 10, 2005 hearing, the parties stipulated to a $250 per hour rate for attorney fees (Doc. 319, 346), and the property owners filed itemized statements regarding the hours spend post-trial in their attempt to have the PT documents (1) struck from the record in the court's consideration of injunctive relief, (2) allowed to supplement the trial court's record for purposes of appeal, and (3) for purposes of monetary sanctions. The first two types of relief have been denied by prior orders of the court (Doc. 238, 306). Since the district court granted the property owners' motion for reconsideration of the magistrate judge's order of October 20, 2006, as it did not address monetary sanctions, this court now addresses that issue pursuant to the district court's mandate (Doc. 347).

A. The property owners' argument for sanctions

The property owners seek sanctions pursuant to the Federal Rules of Civil Procedure Rule 37 for Continental's deliberate failure to conceal information during the course of this litigation, and particularly, prior to trial. The property owners became aware of the PT documents with post-judgment disclosures, and by disclosures made by Continental in the related case filed on March 1, 2004.[FN10]The property owners claim that Continental produced emails describing an elaborate internal communication and document delivery scheme between defendant CSRC and CCC that was solely designed to keep discoverable information from the

property owners and their counsel prior to trial. The property owners argue that the PT documents should have been produced long ago in response to its numerous discovery requests and motions, many of which were reduced to orders to compel discovery against Continental. Asserting prejudice because the PT documents were not available for review before the Eleventh Circuit Court of Appeals,[FN11] the property owners requested sanctions in an amount equal to the judgment,[FN12] or in the alternative, that monetary sanctions should include all attorneys' fees and expenses incurred by the property owners, in addition to the time and effort spent by this court, in addressing Continental's pattern of disregard for the Federal Rules of Civil Procedure, including violations of this court's prior discovery orders. They argue "[u]nless such penalty is imposed against the defendants in the form of monetary sanctions, the integrity of the judicial process will be greatly diminished and the defendants will consider themselves free to offend that process again in the future" (Doc. 346, p. 10-11).

B. Continental's argument against sanctions

*9 Continental contends that Rule 37(a)(4)(A) is not applicable because the PT documents were not produced pursuant to a motion to compel, rather, the PT documents were produced to different property owners in response to different document requests in another case against the same defendents. Counsel for Continental claimed at the hearing on August 18, 2005, that Exhibits A through S were produced in the *Riley* litigation in Alabama state court, and not in this case. In a similar argument, after admitting that it had an obligation to produce certain documents and supplement its discovery responses, Continental argued that even if some of the PT documents should have been disclosed, that the error was harmless because the property owners prevailed at trial. Essentially, what Continental purports is, as long as the property owners prevailed, it does not matter if Continental cheated in its' attempt to win. Continental also

claimed in its' responses that certain documents were subject to attorney-client privilege. Finally, Continental argues in its brief that Rule 37 does not apply to evidence discovered post-trial.

C. Rule 37

Rule 37 governs sanctions for a party's failure to disclose required discovery information. It states as follows:

A party that *without substantial justification* fails to disclose information required by Rule 26(a) or 26(e)(1), or to *amend a prior response* to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. *In addition to or in lieu of this sanction, the court,* on motion and after affording an opportunity to be heard, *may impose other appropriate sanctions.*In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B) and (C) and may include informing the jury of the failure to make the disclosure.

Fed.R.Civ.P. 37(c)(1) *(emphasis supplied).* Pursuant to Rule 37, the court may also (A) order certain facts to be taken as established, (B) prohibit the disobedient party from supporting the designated claims or defenses, or from introducing evidence, and (C) strike pleadings, stay proceedings, enter a default dismissal of the action or judgment, or award monetary sanctions. Fed.R.Civ.P. 37(b)(2)(A)-(C).

The court is not, however, limited to actual harm caused by the misconduct. Rule 37(C)(1) sanctions are broad and encompass not only the rectification of actual harm, but also allow for sanctions for a defendant's failure to maintain and preserve the sanctity of the court and to respect its rules. A district court may impose "an order treating as contempt of court the failure to obey any orders." *Ins. Corp. Of Ireland v. Compagnie des Bauxites de Guinée,* 456 U.S. 694, 695, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). Contempt

may be either civil (remedial) or criminal (punitive-to vindicate the authority of the court). *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827-28, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). A finding of failure to comply with discovery orders is a finding of civil contempt. *Id.* at 833.

***10** The court also has inherent powers to impose sanctions to achieve the orderly and expeditious disposition of cases where a party's conduct disrupts or impairs the judicial process, especially where there is bad-faith conduct. As the Supreme Court indicated in Chambers:

[I]t is firmly established that "[t]he power to punish for contempt is inherent in all courts." This power reaches both the conduct before the court an that beyond the court's confines, for "[t]he underlying concern that gave rise to the contempt power was not ... merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial."

* * *

When there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power. *Id.* at 50.

Chamber v. Nasco, Inc., 501 U.S. 32, 44-45, 50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *see also Byrne v. Nezhat*, 261 F.3d 1075 (11th Cir.2001).

Continental claimed at the hearing on August 18, 2005, that it should not be sanctioned because some of the PT documents identified in Exhibits A through S were produced in the *Riley* litigation in Alabama state court, and were not documents produced in this case post-trial.[FN13] Continental's argument is without merit. The sanctions under Fed.R.Civ.P. 37 are predicated

upon a party's *failure* to disclose information that *should* have been disclosed pursuant to Fed.R.Civ.P. 26(a) or 26(e)(1),[FN14] or *failure* to amend a prior response to discovery as required by Fed.R.Civ.P. 26(e)(2).[FN15] As further discussed below, this court finds that the large majority of the PT documents should have been disclosed in response to properly promulgated requests and prior orders of this court.

Continental also argues that sanctions should not be imposed because the property owners were not harmed given they prevailed at trial. This argument is also without merit. To require the property owners to prove that the verdict would have been greater if they had the benefit of the undisclosed documents would be manifestly unfair. "[A] litigant who has engaged in misconduct is not entitled to ' the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.' " *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir.1978), *citing Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22, 51 S.Ct. 501, 75 L.Ed. 1243 (1931).[FN16]

In addition, Continental claims that the property owners have never linked the undisclosed information to particular discovery requests and that its prior responses were not deficient in any "material respect" (Doc. # 314, p. 3). This argument is refuted by the 19 analytical charts provided by the property owners, Charts A through S, which coincide with Exhibits A through S, appended to the property owners' motion to supplement the trial court record (Doc. 293-1, Doc. 316). Each chart identifies the pertinent discovery request and attaches the specific PT document that was provided post-trial, highlighting the information that related to the request. For example, Chart A outlined the requests made on December 13, 2001 and January 28, 2003, and indicated Continental's response to those request, as noted above.FN17 The property owners outlined other violations as they related to the balance of the PT documents (Charts B-S). In addition, Exhibits Z,

AA and DD, submitted at the November 10, 2005 hearing, outlined further abuses. The abuses primarily pertain to emails between key company personnel, and altered or sanitized documents that revealed that CSRC exercised dominion and control over CCC. This court now discusses more fully the violations in connection with the property owners' numerous requests both pre- and post-trial.

1. Emails

*11 The property owners established that the post-trial discovered information included emails between key officers and employees of CCC and CSRC (Exhibits A through O). In Exhibit A, there are questions coming from CSRC to CCC asking about bag filter problems at the plant. In Exhibit B, there is a March 8, 2004, email from the President of Operations, Rodriguez of CCC, to a CSRC officer discussing problems with equipment (found in daily reports-also not disclosed) at the plant. In Exhibit C, Rodriguez informed Pan, Wu and others of the following:

At the present time the Phenix City Plant has a lawsuit against it alleging that environmental emissions have negatively impacted a community in Columbus, Georgia. Among other required information, we are required by law to provide the opposing attorneys all correspondence (including emails) related to Phenix City bagfilters *[sic]. As you know, the opposing attorneys will take the information and try to show CCC and the Phenix City plant to the jury and public as badly as possible. For that reason, I am asking you to not ask any more questions regarding bagfilter issues or any related environmental emission questions. If you have a need to have more information, please call David Pacobit directly. Or better still, please send the question via our attorney, Tony Ching (with copy to Amy Mathis, and me), so that the information can remain an attorney-client previlege [sic].*

We apologize for this request, but it is important that we not continue to create a larger problem for ourselves than we already

have. If you have any questions, please do not hesitate to let me know. Sorry for the inconvienance [*sic*].

(Doc. # 293-4, Exhibit C, *emphasis supplied*). This email alone suggests an intent by the parties, as of March 10, 2004, to subvert the discovery process.

Continental also argued strongly in their objections to deposing Pan and Wu prior to trial, that these officers knew nothing about environmental problems (Doc. 317-2, Chart A, p. 10; 349:39). The property owners persuasively argue, however, that the collection of emails (Exhibits A through O) suggests additional communications *not disclosed* regarding discussions about environmental issues and pollution control equipment between CCC and CSRC. An email from Rodriguez of CCC (Exhibit Q), instructs the corporate environmental officer of CSRC, to channel SHEA weekly reports through Ching, and to sanitize the documents for further use. The property owners never received the SHEA reports, which were a summary of environmental matters, either before or after trial.

The property owners argue that the filtering of emails was clearly designed to monitor communications between CCC and CSRC for purposes of minimizing the link, in term of the scope of knowledge regarding defects and leaks, between the parent and its subsidiary. Continental's intention is made clear by Exhibit Z. In this email, Rodriguez sent the following message to Ching (questioned by the magistrate judge *in camera*, Doc. 305), and other executives at CCC and CSRC, including Wu and Pan:

*12 I think I understand how confusing it may be to have to work under restricted communications with CCC personnel at this time; but, it is very important that we maintain a specific discipline in communications because CCC is under very strict scrutiny by attorneys that would like nothing better than to be able to use CCC to get to CSRC.

* * *

The fact of the matter is that CCC does not have a lot of money, so if the opposing attorneys were to win their case against CCC, they would not really win much. However, it is my understanding that *if the opposing attorneys were to be able to win their case against CCC and make the link between CCC and CSRC; then they might be able to get money from CSRC. At the advice of our legal people, we are making every effort to prevent the opposing attorneys from making the link. This is why we have asked that certain subjects be run through Mr. Tony Ching, CCC's attorney. This is an attempt to keep that information attorney-client privilege, which means that it is legally invisible to the opposing* But we have to follow strict criteria; it must be sent to Tony Ching, copies only to those that need to know and no one else. The subject matter at this time that needs to go to Tony Ching is subject matter that relates to

1. Bag filters,

2. Thermal oxidizers,

3. Environmental issues,

2. *Any communications that would appear to the Courts or a trial jury that CSRC is exercising control on CCC, particularly capitol* [sic] *budget or a request for expenditures.*

Because this is one way the opposing attorneys would attempt to prove to the legal court that it is not the CCC board that controls CCC but instead, CSRC. Therefore, we have to use caution in our communications pertaining to RFEs.

Doc. 349, Exhibit Z, *emphasis supplied; see also* Doc. 299, Exhibit J ("Communication Guidelines" for written communications relating to bag filters, thermal oxidizers, safety equipment, safety complaints, inspections or other sensitive issues, or other issues relating to litigation).

The relationship between CCC and CSRC was at the heart of the property owners' claim that the parent CSRC knew of the

extent of the leakage problem at the subsidiary CCC. Yet, the PT documents were supplied post-trial, while seeking relief from the trial court's order for Continental to repair, rebuild and/or video monitor bag filters and thermal oxidizer equipment. As the magistrate judge observed at the hearing on November 10, 2005, "the Court would be remiss if it did not consider the scheme or pattern identified by Judge Fuller in his order of withheld documents" (Doc. 349:4).

2. Altered and "Sanitized" Documents

Many documents were altered by Continental before being produced in response to orders to compel discovery. These documents included corporate environmental reports, RFEs, and plant operations reports (Doc. # 293-18, 19, 20 [Exhibits Q, R & S]). It was instructed that these document also be filtered through Ching to be "sanitized" (*See* Exhibit Q). The property owners' Exhibit R, disclosed after trial, showed that CSRC knew that a component of CCC's carbon black production system had "become a potential environmental risk with it leaking daily." Yet, Continental had produced only the sanitized version prior to trial that deleted this very important information. Exhibit R was a request for expenditures, an RFE, to CSRC explaining the problems with the bag filter at the plant, and that it was leaking carbon black. The approval for repairs went up the chain of command and included approval by CSRC management (Doc. 349:48).

*13 The property owners argue these documents provided further support of the relationship between the two corporations. Post-trial, Continental introduced these RFE documents to prove that repairs had been made. Hence, the documents were clearly relevant to the determination that the bag filter problem existed *prior to trial,* as the repairs were made thereafter (Doc. 349:50). Exhibit S identified as "operational weekly reports" dated September 12 through 18, 2002, and January 1 through 8, 2003, were other documents that were "redacted," i.e. parts of the

documents were deleted prior to disclosure. One such document discussed visits by CSRC to CCC for purposes of reviewing major CCC capital projects for 2003 (Doc. 349:54). At earlier proceedings, Continental claimed that the redacted documents were based on attorney-client privilege. It is noted that Continental denied that the documents were subject to attorney-client privilege at hearing on November 10, 2005, and none of the PT documents were referenced on the trial privilege log (Doc.349:44).

This court find that these documents were responsive to original discovery requests and subject to, at the very least, this court's order issued August 6, 2004, the Friday before trial. Hundred of documents were produced on the eve of trial, but the PT documents were not among them. The property owners argue that many of these documents went to the issue of the extent of the operational and environmental problems at CCC, and that Continental "sanitized" certain documents to keep this information from reaching the jury. This court agrees. The undersigned finds that the majority of documents, Exhibits A through S, were responsive to the property owners' pretrial discovery requests. This court also finds that those in the corporate chain of command supported the withholding of relevant evidence, that there was a scheme to withhold these documents and that there may be other undisclosed documents of a similar nature still undisclosed.

Indeed, it appears that the sequence of events throughout the litigation, in addition to the document delivery scheme between the parent corporation, CSRC and it subsidiary CCC, evidenced a deliberate choice by Continental to hide certain evidence by stonewalling and by claiming attorney-client privilege to prevent disclosure of relevant and important evidence prior to trial. Continental's attempt to claim mere oversight seems disingenuous given it disclosed *some* of requested documents in a *related case*, and also used the PT documents for the *purposes of staving off the injunctive relief* sought by the property owners post-trial. After

being questioned by the court, Continental admitted that it did not produce Exhibits A through M, P or Q, and only produced in part Exhibits R and S (*See* Evidentiary Submission in Compliance with this Court's Order of October 6, 2005 filed by Continental, Doc. # 318).[FN18]

Continental also admitted that they decided to stop supplementing prior discovery responses or disclosures at the end of December of 2003, even though they were reminded in this court's order of January 28, 2004, to exercise due diligence, to respond to requests reasonably and promptly, to avoid discovery disputes, to communicate promptly and directly when differences surface and to "cooperate as Officers of the Court with each other and with the court in the resolution of discovery disputes" (Doc. 164, p. 2). The court stated further in its January 28, 2004 order:

***14** In the interest of preserving already-scarce litigation resources for everyone, counsel are advised to apply a conciliatory- rather than adversary-approach to the resolution of their discovery disputes. Their failure to do so will invite this court's consideration of sanctions upon the offending party or counsel. The parties are further reminded that the Court of Appeals has upheld the award of sanctions against a law firm and its client for discovery abuses. *See Bank Atlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045 (11th Cir.1994); *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510 (11th Cir.1986).

These cases are instructive. The district court in *Bank Atlantic*, ordered in part: (1) that defendant produce all witnesses and documents, (2) that defendant bear reasonable costs of plaintiff's time and preparation in filing the motion to strike and in preparing for the new trial, including the costs of expedited discovery, (3) that a $250,000 bond for plaintiff's costs (to be determined post-trial) be obtained, (4) that defendant's asserted privileges be waived, (5) that the plaintiff be awarded triple interest if it prevailed on the merits, (6) that an instruction be given to the jury on defendant's failure to produce discovery as a

factor to be considered in determining defendant's liability, and (7) that its order be published in the official reporter to deter future misconduct. *Bank Atlantic v. Blythe Eastman Paine Webber, Inc.*, 127 F.R.D. 224, 234 (S.D.Fla., 1989). The circuit court affirmed the district court's sanctions. *Bank Atlantic*, 12 F.3d at 1052.

In *Pesaplastic, C.A.*, the district court held the attorneys therein to be in contempt. It awarded sanctions of reasonable expenses, including costs and attorney fees, after a hearing on plaintiff's motion to compel, where the attorneys conducted themselves "in a manner not befitting officers of the court" and where they failed to "deal honestly and fairly with opposing counsel."799 F.2d at 1522. The court added:

The attorneys of the Law Firm have clearly failed to fulfill these duties. Indeed, they represent yet another case of attorneys having "' sold out to the client.' "*Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1154 (11th Cir.1985)... In so doing, the attorneys of the Law Firm lost sight of the fact that, as members of the bar, and officers of the court, or primary responsibility is not to the client, but to the legal system. Our judicial machinery is dependent upon the full support of all members of the bench and bar. Advocacy does not include "game playing." Conduct such as that engaged in here must not, and can not and will not be tolerated.

Id. at 1522-23.

The PT documents go directly to the key issues in the case. First, they go to the issue of whether there were fugitive emissions at the plant. Indeed, counsel for Continental argued during trial, and represented to the jury, that there were few emissions, or if there were any emissions, that they were not harmful (Tr 1:36). Second, they go to the issue of the relationship between the parent and it subsidiary, and the liability attributable to each. The property owners provided detailed charts indicating how each of the documents requested were responsive to pre-trial discovery

requests, motions and orders of this court. Continental made arguments as to some of the documents but, in the end, admitted that it did not produce them. It also did not give an adequate justification for withholding the PT documents. This court is convinced that the majority of the PT documents requested were subject to disclosure under Fed.R.Civ.P. 26(a), 26(e)(1) and 26(e)(2) (duty to supplement) (*See* Doc. 293-1, p. 2-3), and Continental was required to make all reasonable efforts to produced them. *Pesaplastic, C.A.,*. 799 F.2d at 1521. Thus, it is found that Continental willfully, openly and in bad faith refused to comply with direct orders from this court.

*15 It is further noted that defendant CSRC is making the claim on appeal that they are entitled to judgment as matter of law ("JMOL") or remittitur based on insufficiency of evidence regarding direct liability of CSRC (Doc. # 281, p. 10), a position this court notes is inconsistent with the documents withheld. The intent of Continental on appeal is to reduce the verdict, reverse one or more components of the case or obtain a new trial. If they are successful, Continental's strategy to withhold evidence until the post-trial stages would enure to them great benefit. Barring that, there is still the issue of the waste of time and expense of this court in the pre- and post-trial discovery battle that has gone on for some six years. Thus, this court has determined by a review of the record, the PT documents were relevant, intentionally withheld by officers and employees of Continental [FN19] and their counsel, particularly Ching; they were non-privileged and not subject to other protections.

Absent from Continental's arguments is a justification as to why it was proper to force the property owners to seek court intervention over and over again, wasting huge amounts of time and money secure responses to discovery requests, when good faith compliance with the Federal Rules of Civil Procedure would have made such continuous and costly intervention unnecessary. In fact, it appears from the record in this case, that Continental

concealed their non-compliance with discovery requests and orders until after the trial, by systematically ignoring adverse rulings, and now argues post-trial that because the documents were discovered after a verdict was rendered the violations do not count.

In addition, defendant argues that, if discovery violations are found, that the appropriate remedy is a new trial. Defendant cites to *Rozier, supra,* for the proposition that this is the *correct* remedy (and by the supposition suggests that monetary sanctions are not). In *Rosier,* however, *the plaintiff* was requesting a new trial, and the district court had to determine whether the trial court abused its discretion by denying this request under Fed.R.Civ.P. 60(b)(3). The district court concluded that the defendant had perpetrated a "fraud upon the court" by withholding properly requested undisclosed documents and, as such, granted a new trial to plaintiff for the egregious misconduct.*Rosier,* 573 F.2d at 1337-40. As in the instant case, the documents were discovered post-trial. As in the instant case, the documents were properly requested, and the court had issued orders to compel prior to the trial's inception. The case addressed Rule 60 instead of Rule 37, but the policy considerations were the same. The most compelling and overriding policy consideration was adherence to the discovery rules for the proper functioning of the civil litigation process in general:

Our system of civil litigation cannot function if parties, in violation of court orders, suppress information called for upon discovery. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Hickman v. Taylor,* 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947).... The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial ... The aim of these liberal discovery rules is to "make a trial less a game of blind

man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958).... It is axiomatic that "discovery by interrogatory requires candor in responding."*Dollar v. Long Mfg., N. C., Inc.*, 561 F.2d 613, 616 (5th Cir.1977).

*16 *Rosier*, 573 F.2d at 1345.

It is interesting to note that Continental is asking for one of the harshest sanction (new trial) if it is found that it violated the discovery provisions of the Federal Rules of Civil Procedure. Since Continental lost below, this court recognizes that the defendants would possibly *prefer* a new trial because it would give them a second bite of the apple and, potentially, a different (and hopefully, smaller) outcome. This result could actually enure to Continental's benefit, yet the goal of Rule 37 sanctions is to compensate, deter and even punish discovery violations that were committed wilfully and in bad faith. *Goodman v. New Horizons Community Service*, Slip Copy, 2006 WL 940646 (11th Cir.2006). In *Goodman*, the Court succinctly stated: "Rule 37 sanctions were designed not merely to penalized those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Id., citing Carlucci*, 775 F.2d at 1447. Granting a new trial would not necessarily be a deterrent in the instant case, unless this case is reversed on appeal.

The record is replete with motions and orders in connection with discovery requests made of Continental by the property owners. The court in its various orders gave Continental several warnings as to their less than exemplary "established pattern of conduct." The documents in question provide accounts of the internal discussions between CCC and CSRC regarding needed improvements and prevention of carbon black emissions at the Phenix City, Alabama plant. The entire focus of the case revolved around whether there were carbon black emissions that affected

the surrounding property owners and whether CSRC knew of the leaks and/or were involved in authorizing repairs.

It is interesting to note that, after the jury found in favor of the property owners, Continental subsequently submitted these very documents post-trial to stave off injunctive relief claiming the emissions were sporadic and isolated. The value of the documents was evidence by Continental's reliance on them in its' post-trial arguments. Continental has not supplied any substantial justification for withholding these documents; it stated in oral argument, "I cannot explain why those particular documents were not produced" (Tr 1:25), and that it could have been an "oversight" (Tr 1:37). Continental admitted that it should have disclosed certain documents (Tr 1:39). It later argues that the documents were not reviewed for relevance (Tr 1:25). However, it is clear that Continental had plenty of time to make this analysis.

The property owners claim that they would have changed the way the case was presented at trial [FN20] and that it would have strengthened the record on appeal as to actual damages and punitive damages (Doc. 306, p. 10-11, 14-15). They also argue that disclosure could have possibly shortened the trial and made settlement more likely. They further claim, and this court agrees, that early disclosure would have undeniably saved this court valuable time, and the constant battling over disclosures wasted the courts' resources (Tr 1:32). It is also noted that Continental had to be compelled through repeated motions and after sometime lengthy oral arguments [FN21] on various motions, to deliver documents that routinely should have been disclosed. One of the last orders, done on August 6, 2004, four days before trial began, ordered Continental to produce the full text of redacted [FN22] documents, ADEM reports (Exhibit A), Plant Safety Assessment data and privilege logs (Exhibit H) (Doc. 195, p. 4-5). Even at the midnight hour, Continental was contemptuous of direct orders from this court. It was Continental's contumacy, rather than its oversight, that led to Continental's failure to disclose documents

prior to trial. In light of all this, it cannot be argued that the error was harmless.

D. Civil Sanctions: Attorney Fees and Costs

*17 There is no question that Continental failed to comply with direct orders from this court to produce documents the property owners requested during discovery. Plainly, the PT documents evidence a rash of violations to which Continental has no valid response. Continental admitted that it did not produce them. The emails, alone, show a purposeful scheme to prevent the property owners from discovering documents that Continental viewed as harmful to their defense of the case. This court finds that Continental was required to produce pertinent documents contained in Exhibits A through M, P and Q, parts of R and S, as well as Exhibits DD and Z pursuant to Rule 26(a), 26(e)(1) and 26(e)(2) of the Federal Rules of Civil Procedure.

A finding of failure to comply with discovery orders is a finding of civil contempt. *Int'l Union, United Mine Workers of Am.*, 512 U.S. at 833. Rule 37 sanctions such as attorney's fees may be imposed without a showing of willfulness or bad faith on the part of the disobedient party, however, the most severe sanctions of default judgment or dismissal cannot be imposed for violation of a discovery order caused by simple negligence, misunderstanding or inability to comply. *Bank Atlantic*, 12 F.3d at 1049. This district court has "broad, although not unbridled, discretion in imposing sanctions" under Rule 37. *Pesaplastic, C.A.*, 799 F.2d at 1519, citing *Dorey v. Dorey*, 609 F.2d 1128, 1135 (5th Cir.1980).[FN23] This is especially true when the court imposes monetary sanctions. *Id.* Failure to produce documents or individuals for deposition pursuant to motions to compel forms a sufficient basis for the award of attorney's fees. *Id.* A basis for the reasonableness of the fees may be determined by analyzing the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *See, Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

In connection with their motion, the property owners submitted a statement of costs that included a detailed summary of the time and expense incurred by the respective counsel for the various property owners (354-1, Exhibit A). The parties stipulated to a $250.00 per hour rate for attorney fees. The law firm of Beasley, *et al.*, expended 189.20 hours of time and $806.13 in expenses for a total of $48,106.13, in connection with this motion. The law firm of Friedman, *et al.*, expended 206.50 hours and $1,386.90 in expenses, for a total of $42,852.50 (*See* Doc. 354, amended to $42,239.40 in Doc. 357). The law firm of Jackson, *et al.*, incurred 78.85 hours and $1,087.59 in expenses, for a total of $20,800.09 (*See* Doc. 354, amended to $20,400.09 in Doc. 357).

Continental claims the requested costs as submitted are objectionable for the reasons that entries prior to September 9, 2005, were not incurred in making the [supplemental] motion and further claims that "[t]he majority of the expenses claimed were incurred in preparing the Motion to Supplement the Record that was denied by the court" (Doc. 356, p. 3). However, the district court made a finding that monetary sanctions were warranted as early as July 17, 2005, and even though it did not grant the property owners request to supplement the record, it invited them in a later order to propose specific monetary sanctions that might be appropriate. The property owners were successful in proving that Continental violated discovery requests, (and this court made several warnings prior to trial, as well), as to Continental's pattern of disregard for the Federal Rules of Civil Procedure and this court's prior orders. It was only a matter of this court determining what, if any, monetary sanctions were appropriate under the circumstances. While this court does not now consider pre-trial attorney's fees because the jury awarded attorney's fees for the property owners' pre-trial efforts, there is still the matter of *this court's* pre-trial efforts to resolve the many disputes concerning discovery matters initiated because Continental failed to turn over documents that in post-trial retrospect clearly should have been disclosed long before they were later discovered. There

were 65 entries in the docket sheet pre-trial, and 45 post-trial. *See, infra,* at note 25.

*18 Continental claims that some of the entries pertain to the property owners' efforts to supplement the trial court record, relate to the injunctive relief order, and relate to mediation. To the extent that such fees are included in the property owners' statement of cost, they are found unreasonable.[FN24]

Continental claims that the entries are excessive because multiple attorneys reviewed documents and attended hearings. This court notes there were multiple property owners making claims, and the documents produced in this case were voluminous. Continental also was represented by numerous counsel who similarly reviewed documents and attended hearings. If it were Continental's motion, this court does not doubt that it would be asking for attorney's fees for each and every counsel that participated in the work. Therefore, the work of multiple attorneys for the property owners is found reasonable.

Continental also objects to the time spent preparing the analytical Charts A through S. Yet, these charts were used by this court, on more than one occasion, to evaluate if violations occurred, and to determine the appropriateness of sanctions for Continental's decided failure to disclose evidence. Continental further contends that a reasonable rate for some attorneys charge should be $185 per hour and paralegals' rate at $75 per hour (and defendant claims that paragraph 5 of the property owners' submission improperly calculates all attorney and paralegal time at $250 per hour), yet, Continental does not deny that it stipulated to a rate of $250 per hour as reasonable. Moreover, a closer reading of the document shows the property owners did not charge paralegal time at $250 per hour. And, the property owners claim in their brief that they were conservative in the number of junior partners and associates to which it applied this rate (Doc. 357-2, p. 5). In light of all that has transpired, this court finds their claim credible.

E. Punitive Sanctions

Though it responds to sanctions regarding attorney's fees, Continental does not provide any cogent response to the property owners' argument that the many docket sheet entries prior to and post-trial relate in one form or another to the court having to expend time and resources to address Continental's discovery abuses.FN25 Whether it would have shortened trial is speculation, at best, considering the contentious nature of the dispute. However, considerable time *was* spent by the district judge and his staff, the magistrate judge and his staff, and courtroom personnel attending to the various motions and hearings associated with discovery abuses beginning as early as October 2001.

Coercive sanctions by way of fines are generally left to the district court's discretion. In *Serra*, the court stated:

The broad discretion of the district court to manage its affairs is governed, of course, by the most fundamental safeguard of fairness: the Due Process Clause of the Fifth Amendment. *See Ins. Corp. Of Ireland*, 456 U.S. at 707, 102 S.Ct. at 2106-07. To comply with the Due Process Clause, a court must impose sanctions that are both "just" and "specifically related to the particular claim" which was at issue in the order to provide discovery.

*19 *Serra Chevrolet, Inc., v. General Motors Corp.*, 446 F.3d 1137, 1151 (11th Cir.2006); *see also In re Grand Jury Subpoena Duces Tecum*, 955 F.2d 670, 673 (11th Cir.1992) (The imposition of a coercive fine is proper for failure to produce documents, and will not be reversed except for an abuse of discretion). The fine for misconduct must be based on the record evidence and a rationale. *Carlucci*, 775 F.2d at 1146. The cost to the court of the numerous motions, hearings, and orders are an appropriate consideration. There must be, however, some reasonable basis for the accounting of costs and a record of its reasons for the imposition of any fine. *Serra*, 46 F.3d at 1152.

In light of the requirements of *Serra* and *Carlucci,* this court has calculated its approximate time from the date of its last order to compel, August 8, 2004 (Doc. 192). By that date, all of the PT documents should have been disclosed to the property owners. The rest of the time calculated by this court pertains to post-trial discovery orders and recommendations regarding the PT documents (*See* Appendix I, attached, itemizing the court's time for the various entries on the docket sheet pertaining to the evidence wrongfully withheld). Over one hundred hours were spent by this court and its personnel addressing issues relating to the PT documents post-trial. As $250.00 per hour was considered a reasonable rate for counsel's efforts, it is at least as reasonable for the judges' and their staffs' efforts. Many hours were spent issuing orders, conducting hearings and conferences, reading through transcripts and the immense volume of motions, briefs and exhibits. As to the hearings themselves, a court reporter and courtroom deputy also had to be present for the ten-and-a-half hours that were spent listening to the arguments of the parties. Comparable to paralegals, we find that $75.00 per hour is reasonable for the time expended for other courtroom personnel. While the estimated time is not exhaustive of all the court's resources expended to address the egregious discovery abuses, and only considers a small portion of the time spent *pre-trial,* it allows some reasonable basis to account for the imposition of additional fines against the offending party.

This court concludes that Continental withheld evidence in bad faith and in violation of prior orders of this court. As a result, because of Continental's discovery violations, the property owners have been prejudiced in their presentation of the evidence to the jury, and on appeal.

Thus, based upon consideration of the property owners' objections and motion to reconsider the magistrate judge's order denying sanctions (Doc. 346), and the district court's order (Doc. 347, instructing this court also to consider Docs. 293, 308, 308-1),

and for good cause shown, it is the RECOMMENDATION of the magistrate judge:

1. that the Motion be GRANTED;

2. that sanctions be imposed against CCC and CSRC, jointly and severally, in the amount of $120,945.59, for attorney fees and costs (itemized above) of the property owners' time and expense to pursue post-trial litigation in regard to the PT documents;

***20** 3. that additional sanctions be imposed against CCC and CSRC, jointly and severally, in the amount of $26,470.00 for the time and effort spent by the court and its staff from August 8, 2004, in connection with the ongoing litigation of discovery abuses;

4. that the additional sanctions of $26,470.00 is to be paid to the clerk of the court;

5. that this Recommendation be published in the official reporter to deter further misconduct by Continental and like-minded third parties, including litigants and attorneys alike;

It is further

ORDERED that on or before June 26, 2007 the parties may file objections to the Recommendation. Any objections filed must specifically identify the findings in the magistrate judge's Recommendation to which the party is objecting. Frivolous, conclusive or general objections will not be considered by the district court. The parties are advised that this Recommendation is not a final order of the court and, therefore, it is not appealable.

Failure to file written objections to the proposed findings and advisements in the magistrate judge's Recommendation shall bar the party from a de novo determination by the district court of issues covered in the Recommendation and shall bar the party from attacking on appeal factual findings in the Recommendation accepted or adopted by the district court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir.1982).*See Stein v. Reynolds Securities, Inc.*, 667 F.2d

33 (11th Cir.1982); *see also, Bonner, supra,* adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

08/06/2004 *193 Minute Entry for proceedings held before Judge Vanzetta P. McPherson: Discovery Motion Hearing held on 8/6/2004 re 178 MOTION to Compel and 191 MOTION for Protective Order filed by Continental Carbon Incorporated. (Digital Recording: 1:39 to 3:17)(sl,) (Entered: 08/09/2004)	10.50
08/10/2004 *195 ORDERED that the defendant's 194 Objection to and Appeal of the Magistrate Judge's 8/6/04 192 Order is OVERRULED and the challenged ruling of Magistrate Judge McPherson is AFFIRMED. The parties are hereby advised that failure to fully comply with the letter and the spirit of the 8/10/04 Order will result in the imposition of sanctions which will be swift in coming and painful in execution.. Signed by Judge Mark E. Fuller on 08/10/04. (sl,) (Entered: 08/10/2004)	2.00
10/22/2004 *231 ORDER re 230 MOTION to Strike and MOTION for Sanctions filed by The City of Columbus, Ga, Action Marine, Inc., John Tharpe, Owen Ditchfield. Brief in Support due by 11/3/2004 for plaintiffs; Show Cause Response due by 11/17/2004 for defendants as to why the motions should not be granted. Signed by Judge Mark E. Fuller on 10/22/04. (cc,) (Entered: 10/22/2004)	1.00
01/06/2005 *234 ORDERED that a hearing be held on 1/19/2005 at 1:00 PM at the United States Courthouse, One Church Street, Courtroom 2A, Montgomery, AL. The parties should be prepared to address the merits of the plaintiff's pending requests for injunctive relief and the 230 Motion to Strike Certain Defense Exhibits Wrongfully Withheld in Discovery and Request5 for Sanctions. Signed	.50

by Judge Mark E. Fuller on 01/06/05. (sl,) (Entered: 01/06/2005)

01/31/2005 *238 ORDER denying 230 Motion to Strike certain defense exhibits wrongfully withheld in discovery; denying 230 Motion for Sanctions. Signed by Judge Mark E. Fuller on 01/31/05. (mfm,) (Entered: 01/31/2005) 2.00

02/17/2005 *TRANSCRIPT of Motions Hearing held on 1/19/05 in Montgomery, AL before Judge Mark E. Fuller. Court Reporter: James R. Dickens. (sl,) (Entered: 02/18/2005)

2/21/2005 *253 First MOTION To Shorten Time for Response to Interrogatories and Request for Production of Documents by The City of Columbus, Ga, Owen Ditchfield, John Tharpe. (Friedman, Jeffrey) (Entered: 02/21/2005)

02/24/2005 *254 ORDERED that the 253 Motion to Shorten Time for Response to Interrogatories and Request for Production of Documents is granted in part and denied in part. Accordingly, the defendants shall serve copies of their responses upon counsel for the plaintiffs on or before 3/1/05. Signed by Judge Vanzetta P. McPherson on 2/24/05. (sl,) (Entered: 02/24/2005) 1.0

02/24/2005 *255 MOTION for Protective Order to Quash Plaintiffs' Post-Trial Consolidated Discovery Requests, or, in the Alternative, to Deny Plaintiffs' Motion to Shorten Time for Response to Interrogatories and Request for Production of Documents by Continental Carbon Incorporated. (sl,) (Entered: 02/25/2005)

02/24/2005 *256 MEMORANDUM of Law in Support of 255 MOTION for Protective Order to Quash Plaintiffs' Post-Trial Consolidated Discovery Requests, or, in the Alternative, to Deny Plaintiffs' Motion to Shorten Time for Response to Interrogatories and Request for Production of

Documents filed by Continental Carbon Incorporated.(sl,) (Entered: 02/25/2005)

02/24/2005 *258 MEMORANDUM of Law in Support of 257 MOTION for Protective Order to Quash Plaintiffs' Post-Trial Consolidated Discovery Requests, or in the Alternative, to Deny Plaintiffs' Motion to Shorten Time for Response to Interrogatories and Request for Production of Documents filed by China Synthetic Rubber Corporation. (sl,) (Entered: 02/25/2005)

02/25/2005 *MOTIONS REFERRED 255 MOTION for Protective Order, 257 MOTION for Protective Order REFERRED to Judge McPherson. (sl,) (Entered: 02/25/2005)

03/01/2005 *259 RESPONSES (Objection) to plaintiffs' First Post-Trial Consolidated Discovery Requests by Continental Carbon Incorporated. (sl,) (Entered: 03/02/2005)

03/01/2005 *260 RESPONSES (Objection) to plaintiffs' First Post-Trial Consolidated Discovery Requests by China Synthetic Rubber Corporation. (sl,) (Entered: 03/02/2005)

03/28/2005 *270 ORDERED that the 253 First MOTION To Shorten Time requesting an order that the defendant be required to respond to the post-judgment interrogatories and request for production by the end of February 2005 is denied as moot as further set out. Signed by Judge Vanzetta P. McPherson on 3/28/05. (sl,) (Entered: 03/28/2005) .50

03/28/2005 *271 ORDERED that (1) the 255 Motion for Protective Order is denied as moot; (2) the 255 Motion to deny the motion to shorten time is denied. The court has entered an order denying the motion to shorten time as moot. Signed by Judge Vanzetta P. McPherson on 3/28/05. .50

(sl,) (Entered: 03/28/2005)

03/28/2005 *272 ORDERED that (1) the 257 Motion for Protective Order is denied as moot; (2) the 257 Motion to deny the motion to shorten time is denied. The court has entered an order denying the motion to shorten time as moot. Signed by Judge Vanzetta P. McPherson on 3/28/05. (sl,) (Entered: 03/28/2005)

04/04/2005 *273 First MOTION to Compel Post Trial Discovery by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe. (Attachments: # 1 # 2)(Friedman, Jeffrey) (Entered: 04/04/2005)

04/05/2005 * MOTIONS 273 First MOTION to Compel Post Trial Discovery REFERRED to Judge McPherson. (sl,) (Entered: 04/05/2005)

04/05/2005 *274 ORDERED as follows: (1) on or before 4/11/05, the plaintiff shall file a Notice in response to this order as further set out; (2) on or before 4/12/05, the defendants shall file with the Clerk of the court a response to the 273 MOTION to Compel Discovery. Defendants are specifically directed to file separate responses and to number their responses parallel to the discovery requests; (3) the court shall conduct ORAL ARGUMENT on the 273 motion on 4/14/05 at 2:00 p.m. in Courtroom 5A, Frank M. Johnson, Jr United States Courthouse Complex, One Church Street, Montgomery, AL. Counsel for the parties shall appear at the argument. Signed by Judge Vanzetta P. McPherson on 4/5/05. (sl,) (Entered: 04/05/2005) 1.00

04/11/2005 *276 NOTICE by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe re 274 Order,,, Set Deadlines/Hearings,, In Response to Magistrates Discovery Order (Attachments: # 1 # 2)(Friedman, Jeffrey) (Entered: 04/11/2005)

04/12/2005 *278 RESPONSE to 273 First MOTION to Compel Discovery Response filed by Continental Carbon Incorporated, China Synthetic Rubber Corporation. (sl,) (Entered: 04/13/2005)

04/13/2005 *279 ORDERED that the oral arguments set for 4/14/05 at 2:00 p.m. before Judge Vanzetta Penn McPherson is continued generally until further orders of the court. Signed by Judge Vanzetta P. McPherson on 4/13/05. (sl,) (Entered: 04/13/2005) .50

04/15/2005 *280 ORDERED as follows: (1) Oral argument on the 273 MOTION to Compel is RESET from 4/14/05 to 4/22/05 at 11:00 a.m. in Courtroom 5A, Frank M. Johnson, Jr. United States Courthouse Complex, One Church Street, Montgomery, AL; (2) the Clerk is directed to provide a court reporter for this proceeding. Signed by Judge Vanzetta P. McPherson on 4/15/05. (sl,) (Entered: 04/15/2005) .50

04/21/2005 *282 RESPONSE in Opposition re 275 MOTION for Order re Injunctive Relief filed by All Plaintiffs. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8# 9 Exhibit 9# 10 Exhibit 10)(Byrne, David) (Entered: 04/21/2005)

04/22/2005 *284 Minute Entry for proceedings held before Judge Vanzetta P. McPherson: Oral Argument on Post Trial M/to Compel held on 4/22/2005. (Recording Time 11:05 a.m.-12:07 p.m..) (sl,) (Entered: 04/22/2005)

5/17/2005 *288 ORDERED that the 273 Motion to Compel Post Trial Discovery is GRANTED in part and DENIED in part as further set out in order. The defendants shall produce Wu and Lee for depositions at a mutually convenient time and location. Subject to extenuating circumstances, such as illness, Wu's deposition shall take 2.00

place within the United States. Signed by Judge Vanzetta P. McPherson on 5/17/05. (sl,) (Entered: 05/17/2005)

Dep. 2.00

Ct Rpt. 2.00

07/01/2005 *293 BRIEF/MEMORANDUM in Support OF PLAINTIFFS' MOTION TO SUPPLEMENT THE TRIAL COURT RECORD WITH EVIDENCE WRONGFULLY WITHHELD BY DEFENDANTS FROM PRETRIAL DISCOVERY filed by All Plaintiffs. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C# 4 Exhibit D# 5 Exhibit E# 6 Exhibit F# 7 Exhibit G# 8 Exhibit H# 9 Exhibit I# 10 Exhibit J# 11 Exhibit K# 12 Exhibit L# 13 Exhibit M # 14 Exhibit N# 15 Exhibit O# 16 Exhibit P# 17 Exhibit Q# 18 Exhibit R# 19 Exhibit S# 20 Exhibit T# 21 Exhibit U# 22 Exhibit V# 23 Exhibit W# 24 Exhibit X # 25 Exhibit Y)(Byrne, David) Modified on 7/5/2005 to create relation to motion filed 7/1/05 contained within this pleading (qc/djy,). (Entered: 07/01/2005)

07/01/2005 * MOTION to supplement the trial court record with evidence wrongfully withheld by defendants from pretrial discovery by All Plaintiffs (NO PDF document attached to this notice-See Docket Entry 293). (djy,) (Entered: 07/05/2005)

07/06/2005 *297 ORDERED as follows: (1) on or before 7/15/05, plaintiffs must file a memorandum or brief citing the specific legal authority for the relief requested in their 293 Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by Defendants from Pretrial Discovery; (2) on or before 7/25/05, defendants must show cause why the 293 Motion should not be granted; (3) on or before 7/29/05, plaintiffs may file a reply 1.50

brief; (4) plaintiffs' 293 Motion is set for a hearing on 8/8/2005 at 9:00 AM in Courtroom 2A of the United States District Courthouse in Montgomery, AL; (5) Anthony Ching and Juan D. Rodriguez are ORDERED to be present for the 8/8/05 hearing in Montgomery, AL. Signed by Judge Mark E. Fuller on 7/6/05. (sl,) (Entered: 07/06/2005)

07/13/2005 *298 ORDER continuing Hearing on MOTION to supplement the trial court record with evidence wrongfully withheld by defendants from pretrial discovery: Motion Hearing reset from 8/8/2005 @ 9:00 am to 8/18/2005 10:00 AM in Courtroom 2A before Hon. Chief Judge Mark E. Fuller, USC, Montgomery, AL.. Signed by Judge Mark E. Fuller on 7/13/05. Furnished to YG, HC & KG.(djy,) (Entered: 07/13/2005) 1.00

07/15/2005 *299 BRIEF/MEMORANDUM in Support re 293 MOTION TO SUPPLEMENT THE TRIAL COURT RECORD WITH EVIDENCE WRONGFULLY WITHHELD BY DEFENDANTS FROM PRETRIAL DISCOVERY filed by All Plaintiffs. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5# 6 Exhibit 6# 7 Exhibit 7# 8 Exhibit 8# 9 Exhibit 9# 10 Exhibit 10# 11 Exhibit 11# 12 Exhibit 12# 13 Exhibit 13# 14 Exhibit 14# 15 Exhibit 15# 16 Exhibit 16# 17 Exhibit 17# 18 Exhibit 18 # 19 Exhibit 19)(Byrne, David) (Entered: 07/15/2005)

07/21/2005 *300 MOTION to Modify re 297 Order Setting Hearing on Motion, Set Deadlines by Continental Carbon Incorporated, China Synthetic Rubber Corporation. (vmc,) (Entered: 07/22/2005)

07/22/2005 *301 ORDER granting 300 MOTION to Modify Scheduling Order; Defendants' Response to Motion due by 8/1/2005 for MOTION to supplement the trial court 1.00

record; plaintiff may file a response on or before 8/8/2005. Signed by Judge Mark E. Fuller on 7/22/2005. (cc,) (Entered: 07/22/2005)

08/01/2005 *302 RESPONSE in Opposition to plaintiffs' 268 MOTION to Supplement the Trial Record filed by Continental Carbon Incorporated, China Synthetic Rubber Corporation. (sl,) (Entered: 08/02/2005)

8/18/2005 *304 Minute Entry for proceedings held before Judge Mark E. Fuller: Motion Hearing held on 8/18/2005 re MOTION to supplement the trial court record with evidence wrongfully withheld by defendants from pretrial discovery filed by All Plaintiffs,. (Court Reporter James R. Dickens.) (kcg,) (Entered: 08/18/2005) 5.50

Dep. 5.50

CtRpt. 5.50

08/18/2005 *305 Minute Entry for proceedings held before Judge Mark E. Fuller: In Camera Hearing held and maintained UNDER SEAL on 8/18/2005. [Minutes, Exhibits and Witness List maintained with court file in SEAL ENVELOPE] (No PDF Attached) (Court Reporter James R. Dickens.) (kcg,) (Entered: 08/18/2005)

08/19/2005 *306 ORDER denying 293 Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by defendants from Pretrial Discovery to the extent that it seeks any relief other than an award of monetary sanctions. To the extent that plaintiffs' Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by defendants from Pretrial Discovery seeks an award of monetary sanctions, this matter is referred to Magistrate Judge McPherson for a ruling on this matter as it is in essence a ruling relating 3.00

to discovery. The parties are advised that Magistrate Judge McPherson may or may not wish them to provide further written argument or to appear at another hearing on the matter but will leave such matters within her sound discretion. Signed by Judge Mark E. Fuller on 8/19/05. (sl,) (Entered: 08/19/2005)

09/09/2005 *307 ORDERED as follows: (1) on or before 9/16/05, the plaintiff are directed to file a supplemental motion for sanctions pursuant to Rule 37 of the FRCP, which shall include, but shall not be limited to, (a) a request for a definite sum; (b) an itemization of the attorney fees incurred in making the motion; and (c) an itemization of the reasonable expenses incurred in making the motion; (2) on or before 9/30/05, the defendants shall file their response to the motion for monetary sanctions and their brief in support of their response. Signed by Judge Vanzetta P. McPherson on 9/9/05. (sl,) (Entered: 09/09/2005) 2.00

09/16/2005 *308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005 by All Plaintiffs. (Attachments: # 1 Exhibit A-1# 2 Exhibit A-2# 3 Exhibit A-3)(Friedman, Jeffrey) (Entered: 09/16/2005)

09/16/2005 * TRANSCRIPT of Oral Argument on Motion to Supplement Trial Court Record and For Sanctions held on 8/18/05 before Judge Mark E. Fuller. Court Reporter: James R. Dickens. (sl,) (Entered: 09/19/2005)

09/30/2005 *313 ORDER setting Status Conference for 10/3/2005 at 11:00 AM by conference call arranged by counsel for the plaintiff. Signed by Judge Mark E. Fuller on 9/30/05. (sl,) (Entered: 09/30/2005) 1.00

09/30/2005 *314 BRIEF/MEMORANDUM in Opposition To Plaintiffs 308 Supplemental Motion for Sanctions filed

by All Defendants. (Fruin, Peter) (Entered: 09/30/2005)

10/03/2005 * Minute Entry for proceedings held before Judge Mark E. Fuller: Telephone Status Conference held on 10/3/2005. (no pdf is attached) (kcg,) (Entered: 11/09/2005) 1.00

10/06/2005 *316 ORDER that on or before 21 October 2005, the plaintiff shall file with the Clerk of the court 19 individualized analytical charts, labeled Chart A through Chart S, to coincide with Exhibits A through S, appended to the Motion To Supplement The Trial Court Record (293-1), as set out; that on or before 4 November 2005, the defendants shall file with the Clerk of the court a Notice Regarding Withheld Documents, as set out; that a Motion Hearing is set for 11/10/2005 09:00 AM in Courtroom 5A before Honorable Vanzetta P. McPherson on Motion for Sanctions. Signed by Judge Vanzetta P. McPherson on 10/6/2005. (cc,) (Entered: 10/06/2005) 1.00

10/24/2005 *317 Response to Order 316re 293 BRIEF/MEMORANDUM in Support,, Plaintiffs' Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld By Defendants from Pretrial Discovery by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe. (Attachments: # 1 Supplement Chart A# 2 Supplement Chart B# 3 Supplement Chart C# 4 Supplement Chart D# 5 Supplement Chart E# 6 Supplement Chart F# 7 Supplement Chart G# 8 Supplement Chart H# 9 Supplement Chart I# 10 Supplement Chart J# 11 Supplement Chart K# 12 Supplement Chart L# 13 Supplement Chart M # 14 Supplement Chart N# 15 Supplement Chart O# 16 Supplement Chart P# 17 Supplement Chart Q# 18 Exhibit Chart R# 19 Supplement Chart S)(Byrne, David) Modified on 10/24/2005 to create a docket relationship to 316 Order(sl,). (Entered:

10/24/2005)

11/04/2005 *318 Evidentiary Submission in Compliance with This Court's Order of October 6, 2005 filed by Continental Carbon Incorporated. (Brady, Clifford) (Entered: 11/04/2005)

11/10/2005 *319 Minute Entry for proceedings held before Judge Vanzetta P. McPherson: Motion Hearing held on 11/10/2005 re 308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005 filed by All Plaintiffs. (Court Reporter Risa Entrekin.) (Attachments: # 1 Exhibit List) (war) (Entered: 11/14/2005) 2.50

Dep. 2.50

CtRpt 2.50

11/10/2005 * NOTICE of Correction: Exhibit List attached to Minutes of Motion for Sanctions Hearing held on 11/10/05 was inadvertently listed as Defendants' Exhibit List; Document should indicate Plaintiff's Exhibit List (NO PDF ATTACHED) (war) (Entered: 11/21/2005)

11/21/2005 *320 RESPONSE to Motion re 308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005, MOTION to supplement the trial court record with evidence wrongfully withheld by defendants from pretrial discovery filed by All Defendants. (Brady, Clifford) (Entered: 11/21/2005)

11/22/2005 *321 MOTION for Extension of Time to File Response/Reply by All Plaintiffs. (Friedman, Jeffrey) (Entered: 11/22/2005)

11/22/2005 *322 Response to Order Plaintiffs'

Supplemental Submission Pursuant to Magistrate Judge McPherson's Instruction of November 10, 2005 by All Plaintiffs. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(Friedman, Jeffrey) (Entered: 11/22/2005)

01/31/2006 * MOTIONS 308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005, 321 MOTION for Extension of Time to File Response/Reply REFERRED to Judge Judge McPherson. (sl,) (Entered: 01/31/2006)

02/07/2006 *324 ORDER granting plaintiffs' 321 Motion to File Response out of Time. Signed by Judge Vanzetta P. McPherson on 2/7/06. (sl,)11 (Entered: 02/07/2006) .50

04/04/2006 * TRANSCRIPT filed of Discovery Hearing held 8/6/04 before Judge Vanzetta McPherson, re 06-11311-D, 326 Notice of Appeal, 325 Notice of Appeal Court Reporter: James Dickens. (ydw,) (Entered: 04/05/2006)

10/11/2006 *345 [VACATED PURSUANT TO 347 ORDER FILED 11/28/06] ORDER denying 308 Motion for Sanctions as further set out in order. Signed by Judge Vanzetta P. McPherson on 10/11/06. (sl,) Modified on 11/28/2006 (sl,). (Entered: 10/11/2006)

10/20/2006 *346 Objection to re 345 Order on Motion for Sanctions and Motion to Reconsider filed by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe. (Byrne, David) (Entered: 10/20/2006)

10/20/2006 * MOTION to Reconsider re 345 Order. (This document has no pdf attached. See 346 for pdf.) (sl,) (Entered: 10/23/2006)

11/28/2006 *347 ORDERED as follows: (1) the 345 Order filed 10/11/06 is VACATED; (2) all issues relating to the appropriateness of monetary sanctions against defendants raised by plaintiffs' 293 308 and [308-1] motions and all 2.00

submissions in support of plaintiffs' request for monetary sactions as a penalty for alleged discovery violations are hereby referred to United States Magistrate Judge Wallace Capel, Jr. Signed by Judge Mark E. Fuller on 11/28/06. (sl,) (Entered: 11/28/2006)

11/28/2006 * * *Reopen Document 308 Supplemental MOTION for Sanctions (PURSUANT TO 347 ORDER) (sl,) (Entered: 11/28/2006)

11/28/2006 *MOTIONS 308 Supplemental MOTION for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005 REFERRED to Judge Judge Capel. (sl,) (Entered: 11/28/2006)

11/28/2006 *Judge Wallace Capel, Jr added to case due to the retirement of Judge Vanzetta P McPherson who is no longer assigned to case and pursuant to 347 Order. (cc,) (Entered: 11/29/2006)

12/04/2006 *348 ORDERED: (1) the parties shall be available for a telephone conference call on 1/5/07 at 10:00 a.m. to be arranged by counsel for the defendants; (2) the parties shall appear for a hearing on 1/22/07 at 10:00 a.m. in Courtroom 5A, Montgomery, AL; and the Clerk is directed to provide a court reporter for this hearing. Signed by Judge Wallace Capel Jr. on 12/4/06. (sl,) 2.00

12/04/2006 *Set Telephone Conference for 1/5/2007 at 10:00 AM before Honorable Wallace Capel Jr. pursuant to 348 Order. (sl,) (Entered: 12/04/2006)

12/05/2006 *349 TRANSCRIPT of Proceedings re: Motion Hearing (PDF available for court use only) held on November 10, 2005 before Judge Vanzetta Penn McPherson. Court Reporter: Risa L. Entrekin. (sl,) (Entered: 12/06/2006) 12/06/2006 *350 MOTION for Reconsideration re 347 Order,, Terminate Motions, Vacating Magistrate Judge's Order Denying Monetary

Sanctions by All Defendants. (Attachments: # 1 Exhibit Exhibit A-Declaration of Peter S. Fruin# 2 Exhibit Exhibit B-Transcript)(Fruin, Peter) (Entered: 12/06/2006)

12/18/2006 *351 ORDER denying 350 Motion for Reconsideration as further set out. Signed by Judge Mark E. Fuller on 12/18/2006. (cb,) (Entered: 12/18/2006) .50

01/05/2007 *352 Minute Entry for proceedings held before Judge Wallace Capel Jr.: Telephone Conference held on 1/5/2007. (Court Reporter Jimmy Dickens.) (war,) (Entered: 01/05/2007) 1.50

1.00

01/05/2007 *353 ORDERED that the hearing set for 1/22/07 is CANCELLED. The parties shall file a detailed statement of costs within five day and any objections should be filed within five days thereafter. The court will consider no other documents after that point. Signed by Judge Wallace Capel Jr. on 1/5/07. (sl,) (Entered: 01/05/2007)

01/05/2007 * * *Hearing set for 1/22/07 cancelled pursuant to 353 Order entered on 1/7/07. (sl,) (Entered: 01/05/2007)

01/12/2007 *354 Evidentiary Submission re 353 Order,, Terminate Deadlines and Hearings, Plaintiffs' Statement of Costs Related to Their Motion for Sanctions filed by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc:, John Tharpe. (Attachments: # 1 Exhibit A (Plaintiffs' Counsel Time Records)) (Byrne, David) (Entered: 01/12/2007)

01/22/2007 *356 Objection to re 354 Evidentiary Submission, and Statement of Costs filed by All Defendants. (Fruin, Peter) (Entered: 01/22/2007)

02/05/2007 *357 MOTION for Leave to File Amended Statement of Costs and to File a Response to Defendants'

Objections to Plaintiffs' Statement of Costs by The City of Columbus, Ga, Owen Ditchfield, Action Marine, Inc., John Tharpe. (Attachments: # 1 Exhibit A to Motion for Leave)(Friedman, Jeffrey) (Entered: 02/05/2007)	
02/05/2007 *358 ORDER granting 357 Motion for Leave to File amended Statement of Costs and to File a Response to defendants' Objections to plaintiffs' Statement of Costs. The Clerk is directed to file Exhibit A attached to document 357 as a separate document entry in the court record. Signed by Judge Wallace Capel Jr. on 2/5/07. (sl,) (Entered: 02/05/2007)	.50
02/05/2007 *359 RESPONSE to defendants' 356 Objection to plaintiffs' Statement of Costs by Plaintiffs (pursuant to 358 Order) .(sl,) (Entered: 02/05/2007)	
07/12/07 Report and Recommendation of the Magistrate Judge	42.00
Total Judge and chambers times	100.00
Total Court Reporter time	10.50
Total Courtroom deputy time	10.50

FN1. "The property owners" include the City of Columbus, Georgia ("the City"), Action Marine, Inc. ("Action Marine"), a retail boat sales and maintenance business, John Tharpe ("Tharpe"), sole owner of Action Marine, Owen Ditchfield ("Ditchfield"), owner of a residence and rental home in the area. Ditchfield was added as a class representative, but the district court denied class certification. Ditchfield, however, remained in the case as a party plaintiff.

FN2. "Continental" includes Continental Carbon, Inc., ("CCC") and its parent corporation, China Synthetic Rubber Corporation ("CSRC"). Summary Judgment was

granted in favor of the additional defendants Taiwan Cement Corporation ("Taiwan"), Barry Nicks ("Nicks") and Todd Miller ("Miller").

FN3.**Doc. 293** is the brief in support of property owners' Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by Defendants from Pretrial Discovery. **Doc. 293-1** refers to 19 analytical charts provided by property owners, Charts A through S, which coincide with Exhibits A through S ("the PT documents") appended to the property owners' motion to supplement the trial court record (Doc. 293-1, Doc. 317).**Doc. 308** is the property owners' Supplemental Motion for Sanctions and Submission Pursuant to Magistrate Judge McPherson's Order of September 9, 2005. **Doc 308-1** is the property owners' Time Records for matter involving property owners' requests for sanctions.

FN4. Subsequently, the district court granted summary judgment dismissing the claims of fraud, misrepresentation, deceit and strict liability, as well as the City's and Action Marine's claims for emotional distress. Remaining were the claims of negligence, wanton conduct, nuisance and trespass.

FN5. Reserved to the court was the issue of injunctive relief (*See* Doc. 226-7, 299).

FN6. Continental has expressed its intent to appeal to the Supreme Court. *See* website: http://www.wtvm.com/Global/story.asp?S=6592641.

FN7.*See* Footnotes 2 & 4.

FN8.*See Riley, et al. v. Continental Carbon, et al.*, 3:04-CV-712-MHT.

FN9.*See also* related motions: **Doc. 273** (First Motion to Compel Post Trial Discovery); **Doc. 287** (Supplemental

Evidentiary Submission (Based on Newly Discovered Evidence) In Support of Plaintiffs' (273) Motion to Compel Discovery Responses); **Doc. 293** (Brief in Support of Plaintiff Motion to Supplement the Trial Court Record with Evidence Wrongfully Withheld by Defendants from Pretrial Discovery); **Doc. 297** (Order to Supplement the Trial Court Record with Evidence Wrongfully Withheld); **Doc. 299** (Plaintiff's Brief in Support of Motion-with 19 Exhibits); **Doc. 306** (Order denying Motion to Supplement Trial Court Record); **Doc. 308** (Supplemental Motion for Monetary Sanctions).

FN10.*See supra* at note 8.

FN11. This argument is rendered moot by the 110i Circuit's affirmance of the judgment. The case, however, has not yet come to rest, and it is postured for an appeal to the Supreme Court (*See supra,* at note 6).

FN12. This argument was essentially rejected by Magistrate Judge McPherson at the hearing on November 10, 2005 (Doc. 349:4).

FN13.*But see* Continental's response to a post-judgment order of April 11, 2005, suggesting that it intended the documents produced in the state action to be effective for the federal action as well (Doc. # 278, p. 9).

FN14."A party is under a duty to supplement their responses at appropriate intervals (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed.R.Civ.P. 26(e)(1)(a).

FN15."A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the

response is in some material respect incomplete or oncorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed.R.Civ.P. 26(e)(2).

FN16. In *Rosier,* 573 F.2d at 1342, the court further stated as to the defendants failure to supplement its responses: "If Ford in good faith believed that the district court's order was not intended to compel production of this document, the appropriate remedy was to seek a ruling by the district court at that point and not a year after the trial and then only when, by chance, the plaintiff learned of it."

FN17.*See supra* at pp. 6-7.

FN18. In the same submission, Continental claims documents N and O did not exist at the time of trial, and admits that R and S were produced in redacted form (Doc. 318).

FN19.*See* Tr2:11-12.

FN20. The property owners claim that Exhibit DD-which included a spreadsheet of every single equipment malfunction that occurred during the one-month period at all of the plants, including Phenix City-could have cut through days of trial because the charts were sent directly to top officials of CSRC (Doc. 349:18).

FN21. A total of approximately 10.5 hours were devoted just to the three hearings, January 19, 2005, August 18, 2005, and November 10, 2005.

FN22. The court noted in its order of August 10, 2004, that "instead of *obliterating* the objectionable text, the defendants have apparently *omitted* the objectionable text, making it impossible to determine (1) the size of the omission, (2) the context of the omissions, or (3) the ratio between the omitted text and the full document" (Doc. 195,

p. 2, emphasis in original).

FN23. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc) the Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

FN24. It is noted that the property owners voluntarily reduced their fees and expenses for these entries in their amended statement of costs (Doc. 357).

FN25. The discovery related docket entries include: Docs. 81-83, 89, 91-92, 94, 96-98, 100-113, 117-118, 130, 132, 133, 140-143, 148-150, 163-166, 173-174, 178, 183, 189, 191-195, 230-234, 237-238, 253-260, 270-274, 278-280, 284, 287-288, 293, 297-302, 304, 306-308, 314, 316-319, 320, 322, 345-348, 350-353.

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(3)

No. 07-257

FILED
SEP 2 6 2007
OFFICE OF THE CLERK
SUPREME COURT

In the Supreme Court of the United States

CONTINENTAL CARBON CO. AND
CHINA SYNTHETIC RUBBER CORP.,
Petitioners,

v.

ACTION MARINE, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN CHEMISTRY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE AMERICAN CHEMISTRY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, a $635 billion enterprise that accounts for ten cents of every dollar in exports and is a critical component of the nation's economy. ACC members apply the science of chemistry to create and manufacture innovative products and services that make the lives of people throughout the country and abroad better, safer, and healthier.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment that is conducive to economic growth. NAM also seeks to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

In support of these objectives, ACC and NAM regularly file briefs as *amici curiae* in this Court and in other courts in cases that are significant to their respective members. This is such a case. Because ACC and NAM members are often the subject of suits seeking punitive damages, they have a substantial interest in the development of sound legal principles governing the power of juries to mete out punishment in civil litigation.

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to S. Ct. Rule 37.6, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

In *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996), this Court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." To ensure such fair notice, and ultimately to determine whether "a more modest punishment * * * could have satisfied the State's legitimate objectives" of punishment and deterrence (*State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419-20 (2003)), this Court has instructed reviewing courts to examine three guideposts in evaluating whether a punitive damages award is constitutionally excessive. This case provides a valuable opportunity to clarify all three guideposts, including the oft-misunderstood "comparable penalties" guidepost, and to bring the Eleventh Circuit into line with the decisions of this Court and other federal and state appellate courts.

1. This is an environmental case involving discoloration and damage to property (but no claim of physical illness or injury) flowing from the release of "carbon black," a compound with many useful commercial applications, from a manufacturing plant in Phenix City, Alabama. The plant is owned by petitioner Continental Carbon Co. ("CCC"), which is an indirect subsidiary of petitioner China Synthetic Rubber Corporation. Respondents are the City of Columbus, Georgia; city resident Owen Ditchfield; a boat dealership, Action Marine, Inc.; and the dealership's owner, John Tharpe. The jury returned a verdict for respondents, awarding $570,000 to the City for remediation costs, $45,000 to Ditchfield for property damage, $1.2 million to Action Marine for lost business value, and $100,000 to Tharpe for emotional distress. The jury also awarded respondents $1,294,000 in attorneys' fees and $17.5 million in punitive damages. The district court ordered extensive injunctive relief (with an estimated cost to petitioners of $4.2 million). See Pet. 6.

2. The district court denied petitioners' post-trial motion, including their request that the $17.5 million punishment be vacated or substantially remitted because it was excessive when judged under the *BMW* factors. Pet. App. 33a, 41a-47a. With respect to the third *BMW* guidepost – "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases" (*id.* at 42a) – the district court acknowledged its crucial importance in ensuring that a defendant receive fair notice. "'Whether a defendant had constitutionally adequate notice that his conduct might result in a particular damages award,'" the court explained, "'depends *in large part* upon the available civil and criminal penalties the state provides for such conduct.'" *Id.* at 46a (quoting *Johansen* v. *Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337 (11th Cir.), cert. denied, 528 U.S. 931 (1999)) (emphasis added). At the same time, the district court noted that under Eleventh Circuit precedent the comparable-penalties factor "is accorded less weight" than the first two *BMW* factors. *Id.* at 30a (internal quotation marks omitted).

Next, the district court held that the relevant point of comparison was "the civil penalties that could have been imposed by the Alabama Department of Environmental Management ('ADEM')," the agency with responsibility over the Phenix City plant, "for air pollution pursuant to Alabama Code §§ 22-22A-4 and 22A-5." Pet. App. 46a. Those provisions authorize ADEM to impose a civil penalty that "shall not be less than $100.00 or exceed $25,000" for any violation of certain provisions of the Alabama environmental statutes or of "any rule, regulation or standard promulgated by the department, any provision of any order, or any condition of any permit, license, certification or variance issued by the department." Ala. Code §§ 22-22A-5(18)a, 22-22A-5(18)c.[2] "[T]hose statutes," the

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[2] The statute requires ADEM to consider the following factors in selecting the penalty for each violation from within the $100-$25,000 range: "the seriousness of the violation, including any irreparable harm to the environment and any threat to the health and safety of the public;

court explained, also "impose a $250,000 cap on the 'total penalty [that is] assessed in an order issued by the department.' Ala. Code § 22A-5(18)c." Pet. App. 46a.

Rather than evaluate how many violations petitioners had committed, how severe those violations were, and what civil penalties ADEM realistically would have imposed for the violations given the considerations ADEM must evaluate in setting penalties (see note 2, *supra*), the district court simply *assumed* that ADEM would have found at least ten violations and issued an order imposing the maximum of $250,000 in civil penalties. In making that assumption over petitioners' objections, the district court declined to give any weight to ADEM's *actual practice* of imposing civil penalties – which had resulted in no penalties in this case. See Pet. App. 46a & n.7.

Having made this assumption, the district court proceeded to rely primarily on *Johansen*, a pre-*State Farm* case, in which the Eleventh Circuit had upheld a punitive damages award that was $4.25 million higher than the $10,000 civil penalty that the State actually had imposed. Pet. App. 45a n.6, 46a. Focusing on the ratio of the $17.5 million punitive damages award to the maximum available penalty of $250,000 (70:1), the district court deemed it significant that *Johansen* had upheld a punitive damages award that was "400 times greater than the fine the mining company had received." Pet. App. 47a. "In light of this precedent," the court reasoned, petitioners received "adequate notice that their conduct could result in a substantial penalty for pollution." *Ibid.* Thus, although the punitive damages award in this case *exceeded* the $250,000 statutory cap *by $17.25 million*, the district court concluded that petitioners had adequate notice that they might receive the vastly larger punishment.

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the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty." Ala. Code § 22-22A-5(18)c.

3. The Eleventh Circuit affirmed but relied on a somewhat different analysis. Like the district court, it "assumed from the parties' arguments that Alabama law" – and Ala. Code § 22A-5(18)c in particular – was "the appropriate guide" in determining whether petitioners had received adequate notice that they "could be ordered to pay" a $17.5 million penalty. Pet. App. 30a. But the court of appeals disagreed that the $250,000 cap placed an upper limit on the potential civil penalty:

> While it is true that the relevant provision * * * limits "the total penalty assessed in *an* order issued" (emphasis added) by the regulating agency, the statute does not limit the *number* of such orders the agency may issue. In other words, ADEM is empowered to assess a penalty of up to $25,000 per violation up to a total of $250,000 per order. That does not mean that after issuing such an order, [the agency] cannot again assess penalties against a polluter who was the subject of a $250,000 fine.

Ibid. (emphasis altered; citations omitted). "Conceivably, then," the Eleventh Circuit reasoned, "Alabama could fine" petitioners "$250,000 for every ten violations." *Id.* at 31a.

Having concluded that a fine above the $250,000 cap was "conceivabl[e]," the Eleventh Circuit was quick to add that "we cannot simply presume that Alabama would have fined [petitioners] an incalculable number of times or would have assessed the maximum amount each time." Pet. App. 31a. "Nor are we capable of guessing," the panel explained, "as to the frequency of [petitioners'] violations, though evidence in the records indicates that it did indeed violate conditions of its permit and thus the [Alabama statute]." *Ibid.*

Despite these disclaimers, the Eleventh Circuit concluded that, "[c]onsidering the reprehensibility of [CCC's] conduct," it was possible to "*surmise* that *if* Alabama citizens had found themselves the victims of [CCC's] malfeasance, ADEM would have vigorously enforced the relevant statutes and fined [CCC] *closer to the maximum amount, perhaps* several times *if necessary*." Pet. App. 31a (emphasis added). Thus, the court of

appeals concluded, petitioner CCC was "on notice that its actions *could result* in civil penalties that far exceed the per-order cap limiting ADEM's discretion, and *we do not believe it implausible* that vigorous enforcement would have led to an accrual of fines totaling *several million dollars*." *Ibid.* (emphasis added). On the strength of that analysis – which apparently envisioned at least eight separate ADEM orders, each imposing the maximum $250,000 penalty (each of which, in turned, was based on ADEM's imposition of the maximum $25,000 penalty for ten violations) – the Eleventh Circuit concluded that petitioners received adequate notice that they might receive a punishment of $17.5 million because that figure "was not *grossly disproportionate* to the [civil] penalties [CCC] faced for its actions." *Id.* at 32a (emphasis added). Like the district court, the Eleventh Circuit made no effort to test the plausibility of its chain of assumptions by examining ADEM's actual track record of imposing civil penalties on petitioners or anyone else for violations of the State's environmental laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment embodies the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie* v. *City of Columbia*, 378 U.S. 347, 350-51 (1964). The requirement of fair warning protects the rights of individuals against arbitrary and unforeseeable actions by state actors (including lay juries); it also disciplines and checks government power by requiring precision in the definition of crimes before the government may bring to bear the full weight of its prosecutorial authority.

In *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996), this Court noted that, although "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases," the "basic protection against 'judgments without notice' afforded by the Due Process Clause * * * is implicated by civil *penalties*." *Id.* at 574 n.22 (emphasis in original). Moreover, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct

that will subject him to punishment, but also of the *severity of the penalty that a State may impose*." *Id.* at 574 (emphasis added). Applying these fundamental guarantees of fair notice, the Court invalidated as grossly excessive a $2 million punitive damages award that was "tantamount to a severe criminal penalty." *Id.* at 585. In so doing, the Court identified three "guideposts" – "the degree of reprehensibility" of the defendant's conduct; the ratio of the amount of punitive damages imposed to the "harm or potential harm suffered by" the plaintiff; and the difference between the punitive damages awarded and "the civil remedies authorized or imposed in comparable cases" – "each of which indicate[d] that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose." *Id.* at 574-75.

The third *BMW* guidepost, "the civil remedies authorized or imposed in comparable cases," 517 U.S. at 575, is particularly important in assuring that defendants receive fair notice of the magnitude of possible punishment. Beyond its crucial role in ensuring notice, this guidepost ensures that judicial determinations concerning excessiveness are firmly rooted in the soil of legislative or administrative judgments. Precisely because legislatures are in a better position to determine the need for punishment and deterrence, *BMW* instructed that courts must give "substantial deference" to the "legislative judgments concerning appropriate sanctions for the conduct at issue." *Id.* at 583. And where, as here, the relevant civil penalties are embedded in a complex regulatory scheme that is administered by an expert state agency delegated the authority to do so by the legislature, these concerns are heightened. The actual enforcement activities of specialized regulators under such a scheme are a far better measure of the need for deterrence and punishment than is the ad hoc decision of a lay jury.

1. Under this Court's cases, the proper focus of the third *BMW* factor is on the *absolute difference* between (a) the punitive damages award and (b) the legislative and/or administrative civil penalties that might *realistically be imposed* for the defendant's conduct vis-à-vis the plaintiffs. In *BMW*

itself, the Court not only pointed out that the $2 million punitive award was "substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance," but it also emphasized that there was no evidence that such a large punishment had ever been meted out in the real world. See 517 U.S. at 584 (noting absence of "any judicial decision in Alabama or elsewhere indicating that the application of [BMW's] policy might give rise to such severe punishment").

Similarly, in *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 442 (2001), the Court made clear in ordering a remand that a reviewing court should avoid "unrealistic" assumptions in applying the *BMW* factors to assess excessiveness. The Court refused to credit the plaintiff's argument that the defendant would have received the maximum penalty for each of the thousands of offending pieces of promotional materials that it sent out, explaining that it was more realistic to think that this conduct would have been treated as a single violation. *Id.* at 442-443. And in *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003), the Court again cautioned against relying on "remote possibilit[ies]" and "speculat[ion]" in evaluating the comparable-penalties factor. *Id.* at 428. Although the Court framed the second *BMW* factor as a ratio, it reiterated that the critical issue under the third *BMW* factor was the absolute "*disparity* between the punitive damages award" and the comparable civil penalties that might realistically be imposed. *Ibid.* (emphasis added).

This Court's realistic approach to the comparable-penalties factor makes eminent sense. It effectuates both the notice and the comparable institutional competence concerns that underlie this important barometer of excessiveness. Although the theoretical availability of a *range* of civil penalties for the relevant conduct provides a defendant with notice that he may receive punishment within the range prescribed by the legislature, it does not answer the question of where within that range the defendant's civil penalty would likely fall. To answer that question, a reviewing court must consider the severity of the defendant's conduct and the civil penalties such conduct would

likely receive. Where, as in this case, the civil penalty provision is administered by an expert agency of state government – the Alabama Department of Environmental Management (ADEM) – there is all the more reason to consider the regulator's actual practice in imposing civil penalties on the defendant and others. Not surprisingly, many lower federal and state appellate courts have heeded this Court's teachings by applying the comparable-penalties guidepost with a healthy dose of realism.

In the decision below, the Eleventh Circuit departed from this Court's teachings. Not only did it effectively ignore the $250,000 cap on civil penalties under Ala. Code § 22-22A-5(18)c, but it relied on a series of speculative and unfounded assumptions about ADEM's likely punishment actions as well as petitioners' likely recalcitrance in the face of agency oversight. Thus, the Eleventh Circuit assumed that ADEM would determine that petitioners had *committed ten separate violations* of the permit (or of some other, unspecified law or regulation) and would impose the *maximum* penalty of $25,000 for each such violation; assumed that petitioners would be recalcitrant in the face of this large punishment and would continue to violate the permit or Alabama law in multiple ways; and assumed that ADEM would go through the same exercise of finding ten violations, imposing $25,000 fines for each violation, and levying a total punishment of $250,000 – *at least seven more times*. See Pet. App. 31a ("we do not believe it implausible that vigorous enforcement would have led to an accrual of fines totaling several million dollars").

Notably, the court of appeals failed to test *any* of these assumptions against the available evidence of ADEM's *actual practice of imposing civil penalties* against petitioners or others – evidence that shows that the $17.5 million punitive damages award was grotesquely excessive. See pp. 15-16, *infra*. Relying on nothing more than a chain of speculative assumptions, the Eleventh Circuit brushed aside the massive "disparity between the punitive damages award" (*State Farm*, 538 U.S. at 428) and the $250,000 maximum civil penalty (or even the "several million dollars" imagined by the court of appeals, see Pet. App.

31a). And it did so even though that disparity – of *$17.25 (or $15.5) million* – is vastly larger than the disparity this Court held in *BMW* was sufficient to deprive a defendant of fair notice that the larger punishment was a realistic possibility.

II. Further review is also warranted because the Eleventh Circuit's decision exacerbates conflict and confusion in the lower federal and state appellate courts over the meaning of the third *BMW* guidepost. Like the Eleventh Circuit in this case, some circuits and state appellate courts have continued, even after *State Farm*, to rely on speculation about severe, but highly unlikely, legislative penalties in applying this important indicium of excessiveness, whereas other courts have taken the teachings of *BMW*, *Cooper* and *State Farm* to heart. The issue is both important and recurring; it arises in potentially every case where the size of a punitive damages award is challenged under the Due Process Clause. And this case is an excellent vehicle for at least two reasons. First, it is representative of a significant and growing category of punitive damages cases involving environmental torts. Second, the Eleventh Circuit's reliance on a chain of utterly speculative assumptions stands in sharp contrast to this Court's teachings and the available evidence of what a comparable penalty realistically would have been under ADEM's enforcement practices.

ARGUMENT

This case presents a valuable opportunity not only to rectify a glaring example of punitive damages "run wild" (*Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991)), but also to ensure that the *BMW* factors will function as intended: as meaningful guidance for appellate review of punitive damages and as a safeguard to ensure that defendants who are punished through the imposition of exemplary damages receive the fair notice required by the Due Process Clause. As petitioners persuasively demonstrate, the Eleventh Circuit's interpretation of all three *BMW* factors is squarely at odds with this Court's decisions and contrary to the decisions of many lower federal and state appellate courts. Accordingly, and for all the reasons set forth in the petition, further review is clearly warranted.

For reasons of space, *amici* focus in this brief on the Eleventh Circuit's flawed understanding of the third *BMW* guidepost – "the civil remedies authorized or imposed in comparable cases" (517 U.S. at 574). That guidepost is especially important in assuring defendants constitutionally adequate notice of the magnitude of possible punishment.

I. The Eleventh Circuit's Decision Conflicts With This Court's Decisions Concerning The Meaning Of The Third *BMW* Factor

In at least two critical respects, the Eleventh Circuit's decision strays from this Court's teachings concerning the meaning of the comparable-penalties guidepost. Under this Court's decisions, the proper focus of the third *BMW* factor is on the *absolute difference* between (a) the punitive damages award, and (b) the legislative and/or administrative civil penalties that might *realistically be imposed* for the defendant's conduct vis-à-vis the plaintiffs. In the decision below, the Eleventh Circuit made no attempt to evaluate the realistic odds of a $17.5 million civil penalty by the Alabama environmental agency, and instead relied on a series of wholly speculative assumptions that were designed to render meaningless the $250,000 statutory cap on civil penalties. Second, the Eleventh Circuit ignored the fact that – even under its wholly speculative assumptions about the civil penalties faced by petitioners – the $17.5 million punishment meted out by the jury was *at least $15.5 million higher* than the imagined civil penalty (and $17.25 million higher than the statutory cap). That disparity is far greater than the less-than-$2 million disparity this Court held in *BMW* was sufficient to deprive the defendant of adequate notice.

a. In *BMW*, this Court noted that "the $2 million" exaction imposed by the jury was "substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance" (which ranged from a maximum fine of $2,000 to $10,000). 517 U.S. at 584. "*None* of these statutes," the Court explained, "would provide an out-of-state distributor with fair notice that the first violation – *or indeed the first 14 violations* * * * – might subject an offender to a multimillion

dollar penalty." *Ibid.* (emphasis added). Thus, the Court was of the view that the availability of even a civil penalty of $140,000 would not provide constitutionally adequate notice of the possibility of a punitive damages award $1,860,000 higher. And in reaching that result, the Court emphasized the absence of any evidence that such a large punishment had ever been meted out in the real world. See *id.* at 584 (noting absence of "any judicial decision in Alabama or elsewhere indicating that the application of [BMW's] policy might give rise to such severe punishment").

In *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court made clear in ordering a remand that a reviewing court should avoid "unrealistic" assumptions in applying the *BMW* factors to assess excessiveness. *Id.* at 442. In discussing the comparable-penalties guidepost, the Court refused to credit the plaintiff's argument that the defendant would have received the maximum penalty for each of the thousands of offending pieces of promotional materials that it sent out, explaining that it was more realistic to think that this conduct would have been treated as a single violation. *Id.* at 442-43. On remand, the Ninth Circuit understood this Court to have instructed it to look not at what penalties theoretically *might* have been imposed on the defendant, but at whether "Cooper's conduct *likely would* * * * have been subject to civil penalties in any amount approaching the punitive damages awarded by the jury," which the court concluded it would not. *Leatherman Tool Group, Inc.* v. *Cooper Indus., Inc.*, 285 F.3d 1146, 1148 (9th Cir. 2002) (emphasis added). The Ninth Circuit on remand accordingly cut the punitive award by almost 90%, from $4.5 million to $500,000.

Finally, in *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003), the Court reiterated that the critical issue under the third *BMW* factor was "the *disparity* between" the punitive damages award and the comparable civil penalties. *Id.* at 428 (emphasis added). In addition, the Court again cautioned against relying on "remote possibilit[ies]" and "speculat[ion]" in evaluating the comparable-penalties factor. *Ibid.* It noted that while the Court had previously "looked to criminal penalties" in

conducting this analysis, the mere existence of a criminal penalty "has less utility" when "used to determine the dollar amount of the award" because "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Ibid.* Moreover, this Court criticized the Utah Supreme Court for having "speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment" when, in fact, the "most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud." *Ibid.* Because a fine in that amount was "dwarfed" by the $145 million punitive award, the Court reasoned, the third *BMW* factor further showed that the award was constitutionally excessive. *Ibid.*

b. This Court's approach to the third *BMW* factor makes eminent sense. In a world in which severe statutory penalties are often *theoretically* available for conduct that is widespread and generally not punished at all, see *Bowers* v. *Hardwick*, 478 U.S. 186, 197 (1986) (Powell, J., concurring), surely attention to realistically likely penalties is the only approach that will provide meaningful constitutional protection against grossly excessive penalties. Cf. *Lankford* v. *Idaho*, 500 U.S. 110 (1991) (although death penalty was *theoretically* available against defendant at all times, course of proceedings led him reasonably to believe that it was not a realistic possibility, and due process was violated when death sentence was imposed without adequate chance to argue against it) (cited in *BMW*, 517 U.S. at 574 n.22). Moreover, where, as here, the most comparable civil penalties are entrusted by the legislature to enforcement by an expert administrative agency, it would be strange indeed to ignore the agency's actual behavior in evaluating what civil penalties realistically were likely to be imposed. The agency's actual enforcement activities are the most reliable basis for a defendant's notice of the penalty that could be expected.

c. Contrary to this Court's decisions, the Eleventh Circuit failed to examine the civil penalties that might *realistically* be imposed on petitioners by ADEM and gave no indication that it

was properly focusing on the *$15.5-17.25 million disparity* between the massive exaction imposed by the jury and the civil penalties the court of appeals believed were likely to be imposed by ADEM. To be sure, the Eleventh Circuit did acknowledge that, under Alabama law, "[a]ny civil penalty assessed or recovered * * * shall not be less than $100 or exceed $25,000 for each violation, provided however, that the total penalty assessed in each order issued by the department * * * shall not exceed $250,000.00." Ala. Code § 22-22A-5(18)c. See Pet. App. 30a. But the court of appeals rendered the $250,000 cap meaningless by resorting to a series of unwarranted assumptions grounded in nothing more than speculation. First, it posited that ADEM might have issued an order imposing the maximum penalty of $25,000 for each of ten separate violations, thus fining petitioners the statutory maximum of $250,000. Next, it supposed that ADEM might have issued multiple orders, each of which imposed the $250,000 maximum for another ten violations. Pet. App. 31a ("Conceivably, * * * Alabama could fine [petitioners] $250,000 for every ten violations."). Finally, the Eleventh Circuit arrived at the conclusion that it was not "implausible that vigorous enforcement" by ADEM "would have led to an accrual of fines totalling *several million dollars*." *Ibid.* (emphasis added). Thus, the court of appeals evidently envisioned that ADEM would issue at least *eight separate orders*, each imposing the maximum penalty of $250,000 on petitioners – and do so based on a sum total of at least 80 separate violations, each of which would be punished by the maximum fine of $25,000.

As the Eleventh Circuit came close to admitting, the assumptions underlying this imaginary scenario are entirely speculative. "[W]e cannot simply presume," the court of appeals correctly observed, "that Alabama would have fined Continental an incalculable number of times or would have assessed the maximum amount each time." Pet. App. 31a. "Nor are we capable," the court added, "of guessing as to the frequency of Continental's violations * * *." *Ibid.* Despite those disclaimers, the Eleventh Circuit evaluated the comparable statutory penalties

faced by petitioners under Ala. Code § 22-22A-5 based on the assumption that petitioners would commit at least 80 separate violations, would receive the maximum penalty of $25,000 for each of those violations, and would be subjected by ADEM to at least eight separate orders notwithstanding the $250,000 cap placed by the legislature on a single order.

The only basis for this series of wild assumptions, apart from the Eleventh Circuit's unfounded view that petitioners' conduct was highly reprehensible, was the court of appeals' statement that there was "evidence in the record" that petitioners had on one occasion "violate[d] conditions of its permit." Pet. App. 31a. The court of appeals made no effort to justify the leap from evidence of one violation to an assumption of at least 80 separate violations – indeed, it conceded that it was not incapable of making that leap without "guessing." *Ibid.* Nor did the Eleventh Circuit, in its analysis of the comparable penalties factor, attempt to justify its apparent assumption that it would take at least eight separate orders, each imposing penalties of $250,000, before petitioners would cease their supposed but unspecified violations of the permit or of Alabama law. As petitioners demonstrate (Pet. 13-14 n.4), the image of intransigence or truculence painted by the Eleventh Circuit in other portions of its opinion lacks support in the record.

As if that were not enough, the Eleventh Circuit's assumptions are easily refuted by examining ADEM's *actual practice* of imposing civil penalties. For starters, it is undisputed that ADEM imposed *no* civil penalties on petitioners for the conduct underlying this litigation. Beyond that, ADEM's actual practice of imposing civil penalties generally – as reported in official publications that are available on the agency's website and subject to judicial notice – would have provided no warning that a $17.5 million punishment was realistically possible. See, *e.g.*, ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ENVIRONMENTAL SUMMARY 2001 ("2001 Annual Report") <available at http://www.adem.state.al.us/Publications/EnvSummary/EnvSum.htm>. Those materials show, for example, that in all of Fiscal Year 2001, ADEM

imposed a total of *only $389,210* in civil penalties for *all* violations relating to air pollution statewide. *Id.* at 25. Moreover, in 2001, ADEM imposed total penalties for all types of pollution (land, water, and air) of only $2,054,260 (versus $1.85 million in 2000 and $1.2 million in 1999). *Ibid.* This level of penalty assessment hardly gave petitioners fair warning that they would receive a punishment of *$17.5 million*. Indeed, the jury's $17.5 million exaction was $4.5 million higher than the total of *all* civil penalties imposed by ADEM in the eight years spanning 1998-2006. See note 3, *infra*.

Equally at odds with actual experience is the Eleventh Circuit's assumption that ADEM was likely to issue *at least eight separate orders, each* imposing the maximum exaction of $250,000. The agency's own data show that, in 2001, ADEM issued a total of 225 administrative orders, 208 of which imposed monetary penalties – for an average civil penalty of only $9,876.50. *Ibid.*[3] Moreover, of those 208 penalties imposed in 2001, the most that could have reached the maximum level was eight (which would require the assumption that the remaining 200 penalties totaled $54,260). Even assuming that there *were* eight such orders (and it may be that there were none), that would still represent *only 4%* of the agency's total orders imposing civil penalties. In light of this data, the notion that ADEM would have imposed *at least eight consecutive orders*, each imposing a $250,000 civil penalty, is fanciful.

Nor is there any basis in the record or common sense for the Eleventh Circuit's unstated assumption that petitioners would

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[3] The data from other fiscal years are similar. For example, the average penalty imposed by ADEM in FY 2000 was $8,919.50. 2000 Annual Report, at 29 (227 administrative orders, 208 of which impose monetary penalties, with total penalties of $1,855,255). Notably, the total amount of civil penalties imposed by ADEM in the entire eight years spanning FY1999 to FY2006 was only approximately $13 million – still far below the punitive award in this case. See 2006 Annual Report, at 22 ($1.22 million); 2005 Annual Report, at 21 ($1.38 million); 2004 Annual Report, at 5 ($1.16 million); 2003 Annual Report, at 4 ($1.71 million); 2002 Annual Report, at 25 ($2.44 million); 2001 Annual Report, at 25.

have continued to engage in violations and to incur successive $250,000 penalties after receiving the maximum punishment from ADEM. Not only does that assumption ignore the duties owed by petitioners to their shareholders (and the controversy such a course of conduct would have created), but it is also refuted by the record evidence showing that petitioners took various steps to identify and remedy the causes of the carbon black emissions. Pet. 3-4, 13-14 n.4.

The Eleventh Circuit's reliance on speculative assumptions and improbable scenarios is squarely at odds with this Court's decisions in *BMW*, *Cooper* and *State Farm*. Indeed, it is reminiscent of the approach of the Utah Supreme Court that was rejected in *State Farm*. In that case, the Utah Supreme Court had concluded that the third *BMW* factor did not require a reduction of the jury's $145 million punishment because State Farm supposedly could have been required under Utah law to (1) "pay a $10,000 fine for each act of fraud" in the sprawling nationwide "scheme" alleged by plaintiffs; (2) "renounce its business license or have its Utah operations dissolved"; and (3) "disgorge all the illicit profits gained by the scheme, plus pay a fine of twice the value of those profits." 65 P.3d 1134, 1154-55 (Utah 2001). In addition, "State Farm's officers could be imprisoned or removed from office for up to five years." *Id.* at 1155. In reversing, this Court made clear that the lower court was wrong to consider all manner of hypothetical penalties of the Chicken-Little variety, including revocation of State Farm's license to do business and potential criminal penalties. Instead, it should have avoided these "speculat[ions]" and focused solely on the statutory penalty for the fraud concerning the Campbells. 538 U.S. at 428. The Eleventh Circuit in this case made exactly the same mistake.

II. The Eleventh Circuit's Decision Exacerbates Conflicts And Confusion In The Lower Courts Over The Proper Interpretation Of The Third *BMW* Factor

As petitioners persuasively demonstrate (Pet. 18-22), there is widespread confusion in the lower courts over the proper interpretation of the comparable-penalties guidepost. Like the Eleventh Circuit in this case, some circuits have continued, even

after *State Farm*, to rely on speculation about severe, but highly unlikely, legislative penalties, whereas others have taken the teachings of *BMW*, *Cooper* and *State Farm* to heart. Compare *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (Posner, J.) (in upholding $186,000 punitive award based on conduct that was punishable by a fine of $2,500, relying on fact that defendant was also "subject to revocation of its license" to do business, and noting that "[w]e are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license") and *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 349-50 (Ark.) (examining "total civil penalties authorized by law" under both state and federal provisions and assuming that penalties would be imposed for each of 450 consecutive days), cert. denied, 543 U.S. 940 (2004) with *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 608 (6th Cir. 2006) (relying on maximum civil penalties fixed by statute and refusing to rely on possibility that defendant "could potentially be subjected to a larger civil penalty if * * * its corporate license was suspended or revoked" because there was no evidence presented that the latter scenario was likely). See also Pet. 19-20 (citing and discussing additional cases).[4]

In light of these disagreements, it should come as no surprise that some courts have expressed either consternation, or a desire for greater guidance from this Court, or both. Illustrative is the Third Circuit's decision in *Willow Inn, Inc.* v. *Pub. Serv. Mut.*

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[4] Further demonstrating the need for guidance, the district court took a different approach to the comparable-penalties inquiry than did the court of appeals, even though both reached the same result. See pp. 3-6, *supra*. The district court did not adopt the speculative assumptions of the Eleventh Circuit concerning the supposed possibility of multiple ADEM orders, each imposing the $250,000 maximum penalty. Instead, it treated the $250,000 as a true ceiling, but then relied on *Johansen* for the questionable proposition that even a large *multiple* of that figure would be expected by a defendant. As explained above, however, it is the *absolute difference* between the punitive award and the likely civil penalty (not their ratio, which is the basis for the second *BMW* factor) that is most important under the comparable-penalties guidepost.

Ins. Co., 399 F.3d 224 (2005), where the court of appeals noted that "the Supreme Court has not declared how courts are to measure civil penalties against punitive damages, and many courts have noted the difficulty in doing so." *Id.* at 237. "We are similarly unsure," the Third Circuit added, " as to how to properly apply this guidepost, and we are reluctant to overturn the punitive damages award on this basis alone." *Id.* at 238.

The pervasive confusion in the lower courts has not gone unnoticed by commentators. See, *e.g.*, Jenny Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CAL. L. REV. 793, 807-12 (2006) (describing divergent approaches to the comparable-penalties guidepost that have developed in lower courts since *State Farm* and arguing that these divisions "have substantially undercut" this Court's "effort to bring uniformity and coherence to * * * punitive damages law"); Steven Chanenson & John Yotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze From the* BMW/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM 441, 443 (2004) ("The third guidepost remains shrouded in fog."); *id.* at 472 ("both state and federal courts have grappled with applying the third guidepost with little uniform success").

Perhaps most troubling of all, some courts have simply ignored the third *BMW* factor altogether or treated it as a trivial component of the excessiveness inquiry. One recent example is *In re Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007), pet. for cert. filed, 76 U.S.L.W. 3073 (U.S. Aug. 20, 2007) (No. 07-219), where the Ninth Circuit noted that its most recent cases had "generally not attempted to quantify legislative penalties" but had instead merely considered "whether or not the misconduct was treated seriously under state civil and criminal laws." *Id.* at 1094. Moreover, in some recent cases the Ninth Circuit had "not discussed the factor at all." *Ibid.* (citing cases). Having determined that Exxon's misconduct "was taken quite seriously by legislatures," the Ninth Circuit concluded that the comparable-penalties guidepost supported a punishment of $2.5 billion. *Id.* at 1094-95. See also Chanenson & Yotanda, *supra*,

37 U. MICH. J.L. REFORM at 471 ("[A] number of lower courts have simply stated that an award of punitive damages does not run afoul of the third guidepost if there exists a state law that gives the defendant notice that the conduct at issue may give rise to some form of criminal or civil liability."); Pet. 22 (citing additional cases).

Review should be granted to dispel the pervasive confusion and bring greater uniformity to this important area of federal law. As the large number of cases cited by the petitioner and by commentators suggests, the issue is recurring; indeed, it arises in almost every case where a due process challenge is mounted to the excessiveness of a punitive damages verdict. Finally, for several reasons this case is an especially good vehicle for clarifying the comparable-penalties guidepost. First, it is representative of a large and growing category of punitive damages cases involving environmental harms that have caused substantial difficulty for the lower courts.[5] Second, the Eleventh Circuit's reliance on a chain of utterly speculative assumptions stands in dramatic contrast to the available evidence of what civil penalties might realistically have been imposed by the expert administrative agency charged by the State with the responsibility for policing, punishing, and deterring environmental harms. To anyone familiar with the agency's *actual* practice of imposing civil penalties (including its failure to impose *any* penalties on petitioners), the jury's imposition of a massive $17.5 million punishment would have been as unexpected as a lightning bolt out of a clear blue sky.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] See Andrew Moskowitz, Comment, *Meaning Is In The Eye of The Beholder:* BMW *v.* Gore *and Its Potential Impact on Toxic Tort Actions Brought Under State Common Law*, 8 FORDHAM ENVT'L L.J. 221, 223-24 (1996) (describing the "increasing importance of common-law tort actions in environmental law" and attributing this development, among other things, to the fact that many state and federal environmental statutes "do not provide for * * * punitive damages").

Respectfully submitted.

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IN THE

Supreme Court of the United States

CONTINENTAL CARBON CO. AND
CHINA SYNTHETIC RUBBER CORP.,
Petitioners,

v.

ACTION MARINE, INC., ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). In the decision below, the Eleventh Circuit upheld a $17.5 million punitive damages award without comparing petitioners' conduct to the conduct of defendants in other punitive damages cases and without heeding this Court's guidance that a substantial compensatory damages award—in this case, nearly $2 million—cannot generally support a punitive damages award larger than the compensatory damages award. The question presented is whether the punitive damages award is unconstitutionally excessive because petitioners did not "receive fair notice" that their conduct could expose them to $17.5 million in punitive damages.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a $17.5 million punitive damages award is constitutionally excessive where the court of appeals failed to compare petitioners' conduct to that of defendants in other punitive damages cases and where the award dwarfs the already substantial compensatory damages award of nearly $2 million. The Chamber of Commerce of the United States of America has a substantial interest in the correct resolution of that question because the businesses that comprise its membership require legal certainty regarding the permissible bounds of potential punitive damages awards and protection against arbitrary and oppressive awards. As this Court has repeatedly recognized, the most effective means of infusing predictability into the assessment of punitive damages and shielding defendants from unconstitutionally excessive awards is through a rigorous application of the reprehensibility, ratio, and comparable-sanctions guideposts. The court of appeals' decision upholding the punitive damages award in this case rests on a profound misapplication of each of those guideposts.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

The Chamber is the Nation's largest business federation. With a substantial number of members in every State, the Chamber has an underlying membership of more than three million businesses and business organizations, which are of every size and in every industry sector. One of the Chamber's associational purposes is to protect its members from unlawful punitive damages awards, and the Chamber has frequently participated as an *amicus curiae* in litigation concerning the validity of such awards. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

The Chamber is deeply concerned about the failure of an increasing number of lower courts—including the Eleventh Circuit in the decision below—to faithfully apply the punitive damages guideposts. Those constitutional benchmarks provide businesses with notice regarding the possible punitive sanctions that may attach for specific conduct and impose a check upon jurors' "biases against big businesses, particularly those without strong local presences." *State Farm*, 538 U.S. at 417 (internal quotation marks omitted). This Court should grant certiorari to clarify the lower courts' pervasive confusion regarding the *BMW* guideposts and to make clear that the Constitution requires the rigorous application of those guideposts to every punitive damages award.[2]

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[2] Although the court of appeals misapplied all three of the *BMW* guideposts, and a faithful implementation of each guidepost is essential to ensure the constitutionality of a punitive damages award, the Chamber's brief focuses principally on the reprehensibility and ratio guideposts.

STATEMENT

1. Respondents brought this diversity action in the United States District Court for the Middle District of Alabama, alleging that petitioners were liable under Georgia law for negligence, nuisance, trespass, and wantonness, based on the release of a material known as carbon black from their manufacturing facility. The jury returned a verdict in favor of respondents, awarding them $1,915,000 in compensatory damages, which encompassed lost business value, remediation costs, and emotional distress, and an additional $1,294,000 in attorneys' fees. The jury also assessed a punitive damages award against petitioners of $17.5 million.

2. Purporting to apply the guideposts endorsed by this Court in *BMW* and *State Farm*, the Eleventh Circuit upheld the punitive damages award in its entirety. As a threshold matter, the court deemed petitioners' conduct to be "exceedingly reprehensible," even though respondents did not allege that they had suffered any physical harm as a result of the carbon black emissions and petitioners voluntarily remedied the cause of those emissions through modifications to their manufacturing facility. Pet. App. 25a. In evaluating the reprehensibility of petitioners' conduct, the court of appeals "decline[d] . . . to compare [petitioners'] actions with those of other defendants" in other cases and instead "base[d] [its] conclusion on the facts . . . in this case alone." *Id.* at 25a-26a.

Turning to the ratio guidepost, the court of appeals aggregated the compensatory damages award and the attorneys' fees award, and held that the ratio between the punitive and compensatory damages assessed by the jury was 5:1, rather than 9:1 (which would have been the case if the attorneys' fees had

been excluded from the compensatory damages calculation). Pet. App. 28a. While acknowledging this "Court's guidance . . . that ratios in excess of 1:1 and/or 4:1 may only rarely satisfy due process," the court held that the "punitive damages award of $17.5 million is proportionally related to the compensatory damage award of approximately $3.2 million" due to the purported reprehensibility of petitioners' conduct. *Id.* at 28a.

Finally, the court of appeals held that the comparable-sanctions guidepost was also satisfied. Although the Alabama Environmental Management Act provides for penalties of only $25,000 per violation and a total of $250,000 per order—amounts well below the $17.5 million punitive damages award—the court held that "[c]onsidering the reprehensibility of [petitioners'] conduct," they were "on notice that [their] actions could result in civil penalties that far exceed the per-order cap." Pet. App. 31a. It would not have been "implausible," the court concluded, for "vigorous enforcement" by state officials to "have led to an accrual of fines totaling several million dollars" through the imposition of multiple administrative orders. *Id.*

SUMMARY OF ARGUMENT

"Punitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). This Court has therefore attempted to impose rational constraints on punitive damages awards—in the form of three guideposts for evaluating constitutionality—in order to provide defendants with fair notice of the punitive sanctions they may face and to protect defendants against grossly excessive awards. Application of those guideposts, however, has fostered extensive

disagreement among lower courts. Indeed, as the decision below exemplifies, a number of courts have continued to uphold staggering and unwarranted punitive damages awards despite this Court's efforts to establish sensible, constitutionally mandated limitations on punitive damages.

This case affords the Court the opportunity to resolve the lower courts' widespread confusion regarding application of the *BMW* guideposts and to ensure that, through a faithful implementation of those guidelines, defendants are shielded from arbitrary punitive damages assessments. Restoring the *BMW* guideposts as a viable due process safeguard is a matter of exceptional importance to all American businesses, which must daily confront the unfounded and irrational biases of juries in courtrooms across the country.

I. Certiorari is warranted to resolve whether application of the reprehensibility guidepost requires courts to undertake a comparison with conduct and awards in other punitive damages cases. The Eleventh Circuit explicitly declined to perform a comparative analysis—in direct conflict with decisions from the Second and Sixth Circuits, among others—and instead attempted to gauge the reprehensibility of petitioners' conduct and the propriety of the award without reference to other cases.

A comparison with conduct and awards in other cases is essential to determining the reprehensibility of a defendant's conduct and evaluating the constitutional soundness of a punitive damages award. Rejecting a comparative approach to reprehensibility vastly increases the likelihood that arbitrary punitive damages awards will withstand judicial scrutiny. Indeed, evaluating reprehensibility in a vac-

uum removes an important check on the size of punitive damages awards and inevitably results in similarly situated defendants receiving different treatment in factually and legally indistinguishable cases. The Court should use this case as a vehicle for clarifying that comparative analysis is an indispensable component of every reprehensibility inquiry.

II. Certiorari is also warranted to clarify application of the ratio guidepost in cases where the plaintiff has been awarded a substantial amount of compensatory damages. Notwithstanding this Court's instruction in *State Farm* that a ratio of punitive to compensatory damages that exceeds 1:1 will rarely, if ever, be constitutional where substantial compensatory damages have been awarded (538 U.S. at 425), the Eleventh Circuit upheld a $17.5 million punitive damages award to plaintiffs who had already received complete and substantial compensation in the form of large awards of both compensatory damages and attorneys' fees. The Eleventh Circuit is not alone in disregarding this aspect of the Court's punitive damages jurisprudence. *See, e.g., In re Exxon Valdez*, 490 F.3d 1066, 1095 (9th Cir. 2007) (per curiam).

Because it is those defendants who are subject to large compensatory damages awards who are most likely to receive an arbitrary and irrational punitive damages assessment from a biased jury, stringent application of the ratio guidepost is essential to guaranteeing due process in such cases. Courts that apply the ratio guidepost permissively essentially abdicate their responsibility to ensure that these defendants receive due process. This Court's review is necessary to restore the ratio guidepost as a meaningful due process safeguard.

ARGUMENT

I. CERTIORARI IS WARRANTED TO CLARIFY THAT A COMPARISON WITH OTHER CASES IS AN ESSENTIAL COMPONENT OF THE REPREHENSIBILITY INQUIRY.

In evaluating the reprehensibility of petitioners' conduct, the Eleventh Circuit expressly refused to take into account the conduct of defendants in other punitive damages cases and the awards assessed against those defendants. The court of appeals' unwillingness to engage in a comparative inquiry is squarely at odds with the comparative reprehensibility analysis endorsed by several other circuits. It also substantially undermines the efficacy of the reprehensibility inquiry as a means of ensuring that defendants receive constitutionally adequate notice of possible punitive damages awards. Certiorari is warranted to resolve this conflict among the lower courts and to restore the reprehensibility guidepost as a meaningful tool to protect defendants against arbitrary and oppressive punitive damages awards.

A. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). The "basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil penalties" (*id.* at 574 n.22 (emphasis and citation omitted)), and animates much of this Court's punitive damages jurisprudence. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) ("the fundamental due process concerns to which [this Court's] punitive damages cases refer" include the

"risks of arbitrariness, uncertainty and lack of notice").

The guideposts for evaluating the constitutionality of punitive damages awards adopted by this Court in *BMW* are designed to ensure that defendants are protected from "grossly excessive or arbitrary punishments." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). The reprehensibility guidepost—which is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award" (*BMW*, 517 U.S. at 575)—requires a court to place the defendant's conduct on a continuum of wrongdoing in order to assess whether the punitive damages "imposed . . . reflect the enormity of [the] offense." *Id.* (internal quotation marks omitted). "This principle," the Court has explained, "reflects the accepted view that some wrongs are more blameworthy than others." *Id.* The reprehensibility guidepost therefore puts defendants on notice that, as the blameworthiness of their conduct increases, so does the size of the punitive damages award that may constitutionally be assessed against them.

The Eleventh Circuit chose to undertake its reprehensibility inquiry in a vacuum, without comparing petitioners' conduct and the punitive damages award imposed upon them to the conduct and awards in other punitive damages cases. Other courts, however, have endorsed such a comparative analysis as an essential component of the punitive damages inquiry, recognizing that the only meaningful way to evaluate the reprehensibility of a defendant's conduct—and the propriety of the punitive damages award based on that conduct—is to compare both the defendant's misfeasance and the size of the damages award to the facts of other cases. *See, e.g., Int'l Un-*

ion of Operating Eng'rs, Local 150 v. Lowe Excavating Co., 870 N.E.2d 303, 322-23 (Ill. 2006) ("the best way to determine whether a given ratio" between compensatory damages and punitive damages "is appropriate is to compare it to punitive damages awards in other, similar cases").

In *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), for example, the Second Circuit "turn[ed] to other police misconduct cases for assistance in determining the proper" punitive damages award to be assessed against a police officer found liable for malicious prosecution. *Id.* at 812. Based on that comparative inquiry, the court concluded that the $200,000 punitive damages award was excessive because the plaintiff had not suffered any physical injury and the size of the award "exceed[ed] the punitive damages awarded for the numerous and severe physical and psychological harms suffered by" plaintiffs in three other police misconduct cases. *Id.* at 812-13; *see also DiSorbo v. Hoy*, 343 F.3d 172, 188 (2d Cir. 2003) ("To determine the appropriate level of punitive damages, we assess such awards in other police misconduct cases.").

Similarly, in *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629 (6th Cir. 2005), the Sixth Circuit ordered the reduction of an $875,000 punitive damages award in a wrongful arrest case because "an award of $600,000 . . . fit[ ] more comfortably in the ballpark of punitive awards that have been upheld in similar cases." *Id.* at 632. The court concluded that, "[i]n comparative terms, . . . because [the plaintiff] was not beaten, charged or tried, the conduct here was not as reprehensible as the defendants' conduct in some of the civil rights cases [the court] ha[d] canvassed." *Id.* at 649.

B. The Eleventh Circuit did not perform a comparative inquiry in the decision below. Indeed, relying upon the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), which suggested that a comparative inquiry may not be a mandatory component of punitive damages analysis (*id.* at 458), the Eleventh Circuit categorically refused to compare petitioners' conduct and the $17.5 million punitive damages award against them to the conduct and punitive damages awards in other cases. Pet. App. 26a. That holding is flatly inconsistent with the comparative analysis endorsed by, among other courts, the Second and Sixth Circuits. *See also* Pet. for Writ of Cert. at 11 (citing cases from the Eighth and Ninth Circuits and the California Supreme Court adopting a comparative approach to the reprehensibility inquiry). This Court's review is necessary to resolve the lower courts' widespread confusion over whether a comparison with other cases is a necessary component of reprehensibility analysis and to clarify whether the *TXO* plurality's discussion of this question retains any force after *BMW* and *State Farm*.[3]

Resolving the lower courts' uncertainty regarding this issue—and rejecting the Eleventh Circuit's flawed decision not to undertake a comparative inquiry as part of its reprehensibility analysis—is ex-

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[3] A fair reading of *BMW* and *State Farm*—which focus on affording defendants adequate notice of potential punitive damages awards and shielding defendants from arbitrary awards (*BMW*, 517 U.S. at 574; *State Farm*, 538 U.S. at 416)—indicates that the *TXO* plurality's reasoning on this point has been authoritatively superseded because a comparative inquiry is essential to affording defendants notice and preventing the assessment of arbitrary and excessive awards.

ceptionally important to thousands of businesses across the Nation. Indeed, this case vividly illustrates that—despite this Court's efforts to establish constitutional guidelines to cabin juries' broad discretion in awarding punitive damages—juries are continuing to impose staggering punitive damages awards on defendants—and on business defendants, in particular—and that appellate courts routinely uphold such awards. *See, e.g., In re Exxon Valdez*, 490 F.3d 1066, 1095 (9th Cir. 2007) (per curiam) (holding that a $2.5 *billion* punitive damages award was not unconstitutionally excessive); *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W.3d 301, 319 (Tex. App. 2005) (upholding a $10 million punitive damages award in a trespass action where compensatory damages were only $543,000).

As this Court emphasized in *BMW*, the "fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." 517 U.S. at 585. A comparative approach to the application of the reprehensibility guidepost is an indispensable component of the "fair notice" to which this Court has held all punitive damages defendants—including corporations and other business entities—to be entitled. A defendant who can be assured that any punitive damages award assessed by a jury will bear a substantial relationship to the awards imposed upon other defendants in comparable cases has been put on notice regarding the financial repercussions that may accompany specific misconduct.

On the other hand, where a court refuses to consider punitive damages awards in previous cases as part of its reprehensibility analysis, the defendant has significantly diminished protection against arbi-

trary awards disproportionate to the blameworthiness of the defendant's conduct and lacks meaningful notice of the punishment that may be assessed for specific legal transgressions. It is the height of arbitrariness—and an unquestionable violation of fundamental due process principles (*State Farm*, 538 U.S. at 416)—for similarly situated defendants to be subject to vastly different punitive sanctions for comparable conduct. *Compare* Pet. App. 32a (upholding a $17.5 million punitive damages award against petitioners based on harm caused to surrounding property owners by the release of carbon black), *with Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999) (holding that $4.35 million was the maximum punitive damages award that could be constitutionally assessed for harm to surrounding property owners caused by the discharge of acidic water from a mining site). Moreover, just as similar conduct should be treated similarly, less reprehensible conduct should be punished less severely than comparatively more reprehensible conduct; subjecting a defendant who has engaged in only moderately reprehensible wrongdoing to a punitive damages award that is larger than the awards imposed on defendants who engaged in significantly more reprehensible conduct is arbitrary and irrational. *See BMW*, 517 U.S. at 575.

The arbitrary imposition of punitive damages awards creates intolerable legal uncertainty for American businesses, which operate most effectively and efficiently against a backdrop of uniformly applied legal rules and a system of predictable sanctions. This Court should grant certiorari and authoritatively establish that comparative analysis is an indispensable component of punitive damages review. A decision to that effect will infuse urgently

needed predictability into punitive damages jurisprudence, ensure that defendants receive constitutionally adequate notice of the punitive damages that may be assessed against them, and protect against arbitrary and irrational treatment of similarly situated parties.

II. CERTIORARI IS WARRANTED TO CLARIFY THE CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGES WHERE COMPENSATORY DAMAGES ARE SUBSTANTIAL.

Respondents received a substantial compensatory damages award of $1,915,000—which encompassed lost business value, remediation costs, and emotional distress—as well as an additional $1,294,000 in attorneys' fees. Notwithstanding the complete compensation that respondents received both for the alleged harm attributable to the carbon black emissions and for the cost of pursuing this suit, the Eleventh Circuit upheld the jury's imposition of an additional punitive damages award of $17.5 million—a result that directly conflicts with this Court's guidance that ratios of punitive to compensatory damages that are greater than 1:1 are rarely, if ever, permissible where the plaintiffs have received substantial compensatory damages. *State Farm*, 538 U.S. at 425. Because the Eleventh Circuit is not alone in disregarding this aspect of *State Farm*, this Court's review is urgently required to clarify application of the ratio guidepost and to ensure that lower courts do not continue to evade this important constitutional limitation on punitive damages.

A. This Court has made clear that, while "ratios greater than those [it] ha[s] previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of eco-

nomic damages, . . . [w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425 (internal quotation marks omitted). This principle reflects the fact that compensatory damages and attorneys' fees—especially when awarded in large amounts—can deter and punish as effectively as punitive damages. *See generally* Pet. for Writ of Cert. at 23-24. The necessity—and constitutional justification—for a large punitive damages award is therefore obviated where a substantial compensatory award has been imposed. *See* Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. Cal. L. Rev. 133, 137 (1982) (many decisions upholding punitive damages awards are "oblivious[ ] to the basic point that ordinary civil damages—in the course of providing compensation—concurrently function to deter").

Lower courts nevertheless routinely uphold multimillion-dollar punitive damages awards coupled with substantial assessments of compensatory damages. *See, e.g.*, *Exxon*, 490 F.3d at 1095 (5:1 ratio with compensatory damages and settlement payments of more than $500 million); *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1182 (Or. 2006) (97:1 ratio with compensatory damages of more than $800,000), *rev'd on other grounds*, 127 S. Ct. 1057 (2007); *Mission Res.*, 166 S.W.3d at 319 (18.4:1 ratio with compensatory damages of more than $500,000); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 413 (Utah 2004) (9:1 ratio with compensatory damages of more than $1 million); *see also* Pet. for Writ of Cert. at 15-16 & n.7, 27 n.12. Such staggering punitive damages awards raise grave constitu-

tional concerns that a jury fueled simply by bias and emotion has imposed an arbitrary and unwarranted sanction upon a defendant. Indeed, it is often irrational "biases against big businesses" that produce such potentially crippling punitive damages awards. *State Farm*, 538 U.S. at 417 (internal quotation marks omitted).

B. The decision below is part of this troubling trend. Based exclusively on the purported "reprehensibility" of petitioners' conduct, the Eleventh Circuit deemed this case to be "the rare exception" where a ratio in excess of 1:1 was appropriate despite the substantial compensatory damages award. Pet. App. 29a. But even if the Constitution did permit an exception to the 1:1 principle where the defendant's conduct is particularly reprehensible, this case—where respondents suffered no personal injury and petitioners took voluntary steps to remedy the cause of their environmental discharges—would certainly not fall within the contours of that exception. Like *State Farm*, this is a case where the compensatory damages not only afforded petitioners "complete compensation," but also included a "punitive element" in the form of the $100,000 emotional damages award to respondent John Tharpe. 538 U.S. at 426.

Perhaps recognizing the constitutionally doubtful nature of the onerous punitive damages award, the Eleventh Circuit attempted to lower the ratio between punitive and compensatory damages by adding the attorneys' fees award to the compensatory damages assessment, thereby reducing the ratio from 9:1 to 5.5:1. Pet. App. 28a. In so doing, however, the court exacerbated an existing circuit split as to whether attorneys' fees should be included in the amount of compensatory damages for purposes of

the ratio guidepost. *Compare Campbell*, 98 P.3d at 419 (excluding attorneys' fees from the calculation of compensatory damages), *with Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237 (3d Cir. 2005) (including attorneys' fees as a component of compensatory damages). This additional conflict reinforces the need for this Court to provide the bench and bar with authoritative guidance regarding application of the *BMW* guideposts.[4]

Ultimately, regardless of whether the correct ratio in this case is 9:1 or 5.5:1, the award cannot with-

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[4] Indeed, classifying attorneys' fees as part of the compensatory damages award for purposes of the ratio guidepost leads to anomalous and arbitrary results. Consider, for example, two punitive damages cases involving legally and factually indistinguishable conduct and harm. Each plaintiff incurs attorneys' fees of $10,000 while litigating the case, and each is ultimately awarded $5,000 in compensatory damages and $60,000 in punitive damages. The only difference is that in Case 1, the court awards attorneys' fees, whereas in Case 2, the fees are unreimbursed. If fees awarded by a court can be added to compensatory damages under the ratio guidepost, then Case 1 would result in a ratio of 4:1 ($60,000 in punitive damages and $15,000 in total compensatory damages), which would likely withstand constitutional scrutiny under *BMW* and *State Farm*. Case 2 would result in a ratio of 12:1 ($60,000 in punitive damages and $5,000 in compensatory damages), a double-digit ratio that would likely be unconstitutional. *See State Farm*, 538 U.S. at 425. The plaintiff in Case 1 has therefore enjoyed a double benefit over the similarly situated plaintiff in Case 2: the initial award of attorneys' fees, and the subsequent use of that fee award to uphold a larger award of punitive damages. That fee award should militate in favor of a *smaller*, rather than a *larger*, punitive damages assessment. *See Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (when imposing punitive damages, a court "should consider the fact that [a plaintiff] has been awarded substantial statutory attorneys' fees," which "favor[s] a lesser rather than greater award of punitive damages").

stand constitutional scrutiny. The touchstone of this Court's punitive damages jurisprudence is affording defendants "fair notice" of the punitive sanctions that may be imposed for specific conduct. *BMW*, 517 U.S. at 574. If a defendant found liable for several million dollars in compensatory damages could be assessed an additional punitive damages award ranging anywhere from $1.00 to $10 million or more, the defendant would have little meaningful notice of the punitive sanctions that may be assessed. Moreover, it is precisely in cases with large compensatory damages awards—where a jury may have developed sympathy for an injured plaintiff—that defendants need the greatest protection against wholly arbitrary punitive damages awards. *See BMW*, 517 U.S. at 588 (Breyer, J., concurring) (standards governing review of punitive damages "must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior"). Indeed, many courts, including the Eleventh Circuit in the decision below, have erroneously read *State Farm* as creating a virtual safe harbor for single-digit ratios. "Multipliers *less* than nine or 10 are not, however, presumptively *valid* under *State Farm*" (*Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 77 (Cal. 2005) (emphases in original))—where substantial compensatory damages have been awarded, even ratios of 2:1 or 1:1 can raise significant constitutional concerns if they would result in oppressive and potentially bankrupting punitive damages awards.

Rigorous judicial enforcement of the limitations imposed by the ratio guidepost is therefore essential to ensure that defendants are shielded from irrational and constitutionally infirm punitive damages awards "inflicted on a whim" by potentially hostile

and biased jurors. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting). Because lower courts—including the Eleventh Circuit in the decision below—routinely disregard the requirements of the ratio guidepost and regularly uphold punitive damages awards that vastly exceed already substantial compensatory damages assessments, this Court's review is urgently needed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

CONTINENTAL CARBON CO. AND CHINA SYNTHETIC RUBBER CORP.,

Petitioners,

v.

ACTION MARINE, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As explained in the petition, review is warranted because this case exemplifies a pervasive tendency among lower courts to apply the three *BMW* guideposts mechanically, weakening their ability to protect against arbitrary and excessive deprivations of property. These courts have lost sight of the significant constitutional concerns that large punitive damages awards raise, and their decisions undermine each guidepost's vital role in ensuring that the absolute amount of punitive damages is no more than reasonably necessary to satisfy the State's interest in punishment and deterrence.

Respondents say virtually nothing about this disturbing trend. Instead, they attempt to avoid review by arguing that CCC has "unclean hands," mischaracterizing the record, and picking nits with our contention that the lower courts are divided regarding the proper application of the three *BMW* guideposts. But respondents' invocation of discovery sanctions and their assertions that we have understated the level of misconduct cannot obscure the fact that the Eleventh Circuit upheld the astonishingly large exaction in this case without ever once asking whether a less severe punishment would have adequately satisfied Georgia's interests. Meanwhile, respondents' efforts to demonstrate that the Eleventh Circuit's application of the three guideposts is fully consonant with the decisions of other courts are transparently inadequate and, in many ways, serve only to confirm the pressing need for further guidance from this Court.

A. Respondents Mischaracterize The Record In An Attempt To Distract The Court From The Significant Legal Issues Raised By The Petition.

Respondents claim that we "failed to advise this Court of the full depth of [CCC's] misconduct, the extent to which [its] actions were compounded by litigation misconduct at trial, or that the documents [it] failed to produce until after trial would have supported a larger award." Opp. 2 (capitali-

zation altered). Thus, in their view, this case "provides a poor vehicle for review of any conflicts that might exist within the circuits over punitive damages." *Id.* at 13. But it is respondents, not CCC, that have taken substantial liberties with the facts. To set the record straight:

- Respondents malign our evidence that CCC installed the best available pollution control technology ("BACT"), claiming "[t]hat is not what the jury found." Opp. 1. But the jury made no finding either way. Dkt. 216, 217. And even if the jury had "implicitly rejected" this evidence (Opp. 12 n.6), that would in no way diminish our point: State agencies—not juries—determine the BACT. Pet. 3 n.1. Here, ADEM determined that CCC's thermal oxidizer and other equipment were the BACT. *Id.* at 3. It is telling that respondents harp on bagfilter problems without mentioning the thermal oxidizer, which was designed to incinerate any carbon black not captured by the bagfilters. *Ibid.*
- Respondents assert that we "misrepresent[ed]" the record by contending that "uncontradicted evidence showed that [CCC] identified and remedied the causes of emissions when they occurred," pointing out that discharges were not visible at night. Opp. 4 & n.2. But CCC installed Triboguards to detect solid particles in the waste stream. Pet. 3. Moreover, PX17 shows that each time there was a leak, CCC employees investigated and repaired it. Respondents' complaint below was merely that CCC should have built new facilities earlier instead of continuing to repair old ones.
- Respondents maintain that CCC "did not remedy any of those problems or replace any equipment until after this case was filed" and that "the bulk of [CCC's] equipment problems were not addressed until after the jury returned its verdict." Opp. 6. This is false. The complaint was filed in 2001. Dkt. 1. Before then, CCC had repaired leaks as they occurred (PX17) and replaced the filter

bags every six months (R74). CCC also fixed the accumulator tank system and tail gas leaks in Unit 1 and "pretty much" solved the Unit 2 problems by adding two additional bagfilter compartments in 2003 (Pet. 4; R167, 182, 385)—long before the verdict on August 25, 2004.

- Respondents' description of the testing results (at 5) is misleading. They intimate that only "[o]ne sample collected at the Rigdon Park baseball field and one at Memorial Stadium" tested negative. *Ibid.* But negative samples were also collected from Whopper Field (R1447, 1476, 1613, 1795-96), the South Commons concession stand area (R1447-48, 1611-12; DX162, at 4), the interior of the Civic Center (R1445-46), and the Civic Center vehicles (R1464). As to the positive samples, respondents fail to mention that testing showed only insignificant amounts of carbon black in all but one, meaning that CCC's emissions did not cause the discoloration. Pet. 5; see R1817, 1863-64. In any event, our point is not that there was an "injustice" (Opp. 5), but simply that the award of compensatory damages for *all* of these properties was "substantial" by any definition and manifestly constituted "complete compensation." Pet. 16.
- Respondents contend that CCC "intentionally harmed people," relying on the jury's finding that CCC acted with a "specific intent to cause harm to the plaintiffs." Opp. 1, 3. But the instructions equated "specific intent to cause harm" with the belief that harm was "substantially certain" to result. Pet. App. 12a-18a. Respondents never argued at trial that CCC maliciously desired to cause harm—only that CCC knew that property damage would occur if it failed to prevent emissions.
- Respondents argue that carbon black emissions risked "the health of the community" because CCC's Material Safety Data Sheets ("MSDSs") indicate that carbon black is a "possible human carcinogen" and a "hazardous substance." Opp. 6 n.4. But the MSDSs show that

OSHA and other bodies have *not* designated carbon black as a possible carcinogen. Pet. 5 n.3. While IARC has done so based on rat inhalation studies, even it concluded that "[t]here is inadequate evidence in humans for the carcinogenicity of carbon black." *Ibid.* Moreover, the other hazards identified by OSHA arise only after carbon black exposure of a certain amount and duration. PX32-8. Respondents never showed that CCC's periodic, atmospheric releases of carbon black met those thresholds.

- Respondents repeatedly reference the district court's imposition of discovery sanctions against CCC for withholding documents, as well as its finding that this litigation misconduct prejudiced respondents at trial and on appeal. See Opp. 1-4, 13. But respondents fail to mention that the documents withheld are not a part of the record here (Dkt. 306) and produced a separate money judgment of $120,945.59 (Resp. App. 2a). Moreover, the trial court's finding that respondents were prejudiced on appeal was based on its erroneous belief that CSRC challenged "direct liability" on appeal (*id.* at 26a), which it never did (Pet. App. 1a n.1). While respondents insinuate that documents uncovered post-trial concern causes and remedies of emissions and thus are "germane to assessing the reprehensibility of [CCC's] conduct" (Opp. 4), it is clear from the sanctions order that they received those documents *in 2003*—well *before trial* (Resp. App. 9a-10a).

The purpose of these examples is not to challenge the jury's liability findings (cf. Opp. 1, 3), but to challenge the amount of punitive damages awarded, which is reviewed *de novo* (Pet. 10). In *BMW*, for instance, the jury found both fraud and an intent to injure, and those findings were affirmed by the Alabama Supreme Court. See *BMW of N. Am. Inc.* v. *Gore*, 646 So. 2d 619, 622-23 (Ala. 1994); Ala. Code § 6-11-20(b)(1). But that did not prevent this Court from granting review and finding $2 million to be excessive pun-

ishment. So too here: The foregoing examples help to show that, despite respondents' attempt to demonize CCC, the true nature of CCC's conduct cannot justify a $17.5 million exaction. Even if respondents' characterizations of CCC's conduct were accurate, however, that conduct would still pale in comparison to the large-scale, life-threatening fraud in *Boerner*, the death threats in *Planned Parenthood*, and the intentional targeting of vulnerable individuals in *Kemp* and *Johnson*. Pet. 12-13. Review is warranted to clarify that multimillion-dollar punitive awards "tantamount to severe criminal penalt[ies]" (*BMW*, 517 U.S. at 585) should be reserved for cases of "egregiously improper" misconduct (*id.* at 580) in which the compensatory damages and other costs borne by the defendant are clearly insufficient to accomplish the State's interests in deterrence and retribution.

B. Respondents' Attempt To Demonstrate The Absence Of Confusion Over The Three Guideposts Has Just The Opposite Effect.

Respondents deny that the lower courts are divided as to the proper application of the three *BMW* guideposts and claim that it is only CCC that is "confound[ed]." Opp. 13-23. But respondents' effort to demonstrate the absence of confusion has precisely the opposite effect. It shows not only that there are in fact divisions among the courts but, more importantly, that the confusion is undermining the guideposts' usefulness in ensuring that defendants are not deprived of property arbitrarily and have fair notice of the extent of the punishment they can suffer.

1. Reprehensibility. After falsely stating (at 13) that we did not present a question for review on the comparative nature of the first guidepost (see Pet. i), respondents try to dismiss the conflict on this issue by arguing that we "confound two rightly separate analyses: ascertaining the degree of reprehensibility, and ascertaining appropriate damages once reprehensibility has been decided." Opp. 14. The first guidepost, respondents contend, involves only the former analysis,

which simply requires that courts consider the five "factors" set forth in *State Farm*. *Id.* at 14-15.

But it is respondents who are mistaken. The narrow conception of the reprehensibility inquiry to which they and the Eleventh Circuit subscribe is irreconcilable with this Court's statements on the subject. The Court made clear in *BMW* that the first guidepost requires courts to ask whether the conduct is heinous enough to warrant the amount of punishment imposed. In other words, the "punishment should fit the crime." 517 U.S. at 575 n.24. It therefore is not sufficient to ask "Is the conduct bad?," as the Eleventh Circuit did; the conduct has to be bad to warrant any punitive damages in the first place. Pet. 23. Instead, for this guidepost to serve as a constraining force, courts must also ask whether "the extraordinary size of the award * * * is explained by the extraordinary wrongfulness of the defendant's behavior" (*BMW*, 517 U.S. at 595 (Breyer, J., concurring)). And it is impossible to do that without attempting to place the conduct on a spectrum of reprehensibility by comparing it to other punishable conduct.

Tacitly recognizing this point, several courts have compared the conduct before them to other punishable conduct when applying the first guidepost. See Pet. 11.[1] Others have engaged in a similar exercise when determining whether the gravity of the offense justifies the absolute amount of the punishment (see cases cited at Chamber of Commerce Am. Br. 9), which is much the same thing, respondents' assertions to the contrary (Opp. 16-17) notwithstanding. Unfortunately, many other courts apply the *State Farm* factors in a vacuum, declaring the misconduct before them to be "reprehensible" without any consideration of where it ranks on a spectrum of reprehensibility. See, *e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (8th Cir. 2005); *Rhone-*

[1] Respondents' claim (at 16) that none of these cases "engage[d] in a comparative analysis in order to assess the degree of reprehensibility" is simply wrong, as a review of the cases will show.

Poulenc Agro, S.A. v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-71 (Fed. Cir. 2003); *Hayes Sight & Sound, Inc.* v. *ONEOK, Inc.*, 136 P.3d 428, 446-47 (Kan. 2006). This Court should resolve the conflict.

On the merits, respondents argue that it would be unduly burdensome for reviewing courts to have to engage in a comparative reprehensibility analysis. Opp. 15-16. But it doesn't take a whole lot of time or effort to conclude that a failure to act more aggressively to prevent the escape of a non-toxic substance is much less reprehensible than a malicious battery, a conspiracy to intimidate through death threats, a scheme to defraud the vulnerable, or the deliberate dumping of a dangerous substance (to name just a few more egregious forms of misconduct). Nor would it be unduly time-consuming for a court to perform the legal research necessary to confirm that a punishment of $17.5 million is much higher than the punitive awards permitted for materially more serious misconduct. Indeed, as with any other legal issue, the parties can be expected to bring the most salient cases to the court's attention.

Respondents also argue that *Cooper Industries, Inc.* v. *Leatherman Tool Group*, 532 U.S. 424 (2001), indicates that such comparisons should be made by the jury, not reviewing courts. Opp. 16. In fact, *Cooper Industries* made clear that it is no longer appropriate to leave such matters to the discretion of the jury because "the theory behind punitive damages has shifted toward a more purely punitive (and therefore less factual) understanding." 532 U.S. at 437-38 n.11; see also *id.* at 440 (noting that appellate courts are well suited to make "broad legal comparison[s]").

Finally, respondents contend that the court below "found that none of the instances Petitioners had proposed for comparison were, in fact, similar to the case at hand." Opp. 17. Even accepting this generous reading of the opinion, it is undeniable that the court below was willing to consider only other cases involving the same conduct. Pet. App. 26a. But

nothing could be more arbitrary than to uphold a $17.5 million punishment that is millions of dollars higher than the exactions in cases involving materially more heinous conduct merely because the defendant could find no case with sufficiently similar facts to suit the reviewing court. Review is necessary to make clear that the court below erred by refusing to compare CCC's conduct to other punishable conduct when applying the first guidepost.

2. Ratio. Respondents' principal response to our contention that the lower courts need further guidance about the proper application of the ratio guidepost is to accuse us of "manufactur[ing] a mathematical bright-line straight-jacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together" (Opp. 19). This contention is doubly misguided. First, bright line or not, it cannot be denied that several courts have read *State Farm* to create a presumption that the punitive damages may not exceed compensatory damages when the latter are "substantial." See Pet. 14-15. The split is real and growing. Second, respondents misunderstand this Court's refusal to endorse a single bright-line ratio. The Court was merely confirming the obvious: Because the amount of compensatory damages, the need for added deterrence, and the degree of reprehensibility will vary from case to case, no one ratio will mark the constitutional dividing line in all cases. That is a far cry from saying that it is hopeless to try to bring rationality and consistency to this guidepost.

Indeed, precisely because no single ratio is appropriate for all cases, the lower courts sorely need guidance about the considerations that should bear on proper application of this guidepost in any particular case. Here, for example, the Eleventh Circuit should have considered that the compensatory damages were exceptionally generous (compensating for remediation of properties that tested negative, for the ordinary debts of a business, and for the emotional distress of its owner), that CCC had to pay a massive amount of attorneys'

fees, that CCC had to pay millions to comply with the injunction imposed by the district court, and that CCC suffered significant reputational harm. And although it baldly asserted that CCC's tort was bad enough to warrant a 5.5:1 ratio, the court below should have considered the *relative* reprehensibility of CCC's conduct, which is far less heinous than the wide-scale, life-threatening fraud in *Boerner* or the repeated defrauding of a principal by its agent in *Doherty*, cases in which appellate courts concluded that a ratio of 1:1 marked the constitutional dividing line. See Pet. 14-15.

In addition, respondents barely address the two splits implicated by the Eleventh Circuit's treatment of attorneys' fees: whether such fees may be included in the denominator of the ratio, and whether their existence supports a lower ratio. Pet. 17-18. Respondents say nothing about the first split. They argue (at 24-25 n.9) that the second split is "illusory" because the fee awards in the cases we cited were small compared to the punitive damages. But if a small fee award reduces the permissible ratio of punitive to compensatory damages because of its punitive and deterrent effects, a large fee award does so to an even *greater degree*. See Pet. 17-18, 23-24. Contrary to respondents' supposition (Opp. 24-25 n.9), that is true even if the *purpose* of the fee award is to compensate. See Pet. 17 n.9, 23-24.[2]

3. Comparable Penalties. Respondents suggest that the division in the courts over whether the third guidepost requires comparison with penalties that are realistic, not merely hypothetical, isn't worthy of resolving because this Court has given the third guidepost "a lesser level of importance than it

[2] Respondents claim that a smaller punitive award would be inappropriate here because it would not "disgorge Petitioners of the unjust gain they realized from [the misconduct]." Opp. 20-21 n.7. Although they urged this point below, neither court embraced it. We explained the multiple flaws in respondents' disgorgement theory in our opening appellate brief at 55-59 and reply brief at 28-29.

has accorded to the other guideposts." Opp. 21. But that belief, which is shared by many courts (see Pet. 22), serves only to confirm the need for this Court to grant review and clarify that its statement in *State Farm* that there was no need to "dwell long on this guidepost" (538 U.S. at 428) meant only that the punitive award at issue self-evidently failed this test, not that the guidepost is of comparatively minor importance.

Without denying that the Eleventh Circuit engaged in rank speculation when applying the third guidepost, respondents claim that there is "no conflict that should engage this Court' attention." Opp. 22. Oddly, they ignore the cases that we said were in conflict with the Eleventh Circuit's approach (see Pet. 21). Instead, they assert that none of the cases on the same side of the divide as the Eleventh Circuit "demonstrate a flaunting of this Court's instructions." Opp. 23. Although that assertion would not eliminate the split (but serve only to condemn the Eleventh Circuit as an outlier), it is patently wrong, as a review of the cited cases will confirm.

* * *

We explained in the petition (at 29-30) that this case and *Exxon Valdez* are both excellent vehicles for providing the necessary guidance on the excessiveness inquiry, and we suggested that the Court may wish to either grant review in both cases or hold one pending its resolution of the other. Indeed, given the very substantial threshold maritime law questions presented by Exxon, there is even more reason for granting review in both cases to ensure that the Court can reach the excessiveness issue. Exxon's petition is currently scheduled for distribution on October 17 for consideration at the November 2 conference (one week after the scheduled conference for this case). CCC respectfully suggests that the Court reset this petition for that conference so that both petitions can be considered together.

CONCLUSION

The petition for a writ of certiorari should be granted.

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